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**A CONCISE TREATISE ON THE LAW AND
PRACTICE OF CONVEYANCING.**

A CONCISE TREATISE
ON THE
Law and Practice
OF
CONVEYANCING.

TOGETHER WITH
THE SOLICITORS' REMUNERATION ACT, 1881,
AND
GENERAL ORDER, 1882,
AND THE
LAND TRANSFER ACTS, 1875 AND 1897,
AND THE RULES AND ORDERS THEREON.

By RICHARD HALLILAY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, LATE HOLDER OF AN EXHIBITION
AWARDED BY THE COUNCIL OF LEGAL EDUCATION, AND ALSO OF THE
STUDENTSHIP OF THE FOUR INNS OF COURT.
AUTHOR OF "A DIGEST OF THE EXAMINATION QUESTIONS AND ANSWERS," ETC.

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PREFACE TO THE SECOND EDITION.

SINCE the publication of the first edition of this work several important changes have been made in the law applying to Real Property and Conveyancing by statutory enactments and by judicial decisions. As to the former I may instance the Settled Land Acts, 1884, 1887, 1889, and 1890; the Finance Act, 1894; the Copyhold Act, 1894; the Land Transfer Act, 1897; the Land Charges Act, and the Agricultural Holdings Act of the present year. The changes effected by these and other statutes, and by judicial decisions, have, as far as practicable, and in some instances through the liberality of the publisher, been made in the text of the present edition.

Special attention has been given to the law and practice relating to investigation of title, and the preparation of deeds of conveyance, &c. New chapters have been added on Bills of Sale; Bonds; the Statutes of Limitation; and on the Land Transfer Acts, 1875 and 1897, and the Rules issued under those Acts.

The work has consequently been considerably enlarged, and in great part rewritten. And it is trusted that it will be found sufficient for examination purposes on the subjects it embraces, and will also meet the requirements of the young practitioner while conducting the ordinary duties of a conveyancing practice.

R. H.

THE TEMPLE,

September, 1900.

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TABLE OF ABBREVIATIONS OF TEXT BOOKS, &c., CITED.

A. C.	Appeal Cases, House of Lords (Law Reports)
Add. Cont.	Addison on the Law of Contracts.
A. & E.	Adolphus and Ellis's Reports, King's Bench.
Atk.....	Atkyns's Reports, Chancery. 8 vols.
Baldw. Bk.	Baldwin's Treatise on the Law of Bankruptcy.
Bann. Stat. Lim.	{ Banning's Treatise on the Statutes Law of Limitation of Actions.
B. & A.	Barnewall and Alderson's Reports, King's Bench.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench.
B. & C.	Barnewall and Creswell's Reports, King's Bench.
Beav.	Beavan's Reports, Rolls Court.
Best on Ev.	Best on the Law of Evidence.
Bing.	Bingham's Reports, Common Pleas.
Bing. N. S.	Bingham's Reports, New Series, Common Pleas.
Bk. R.....	Bankruptcy Rules.
Bl. Com.	Blackstone's Commentaries.
Brickd. & Sh.....	Brickdale and Sheldon on the Land Transfer Acts.
Broo. Max.	Broom's Legal Maxims.
Bro. C. C.	Brown's Chancery Cases. 4 vols.
Buck. Comp.	Buckley on the Law and Practice of Companies.
Bullen, Dist.	Bullen on the Law of Distress for Rent.
Burr.	Burrow's Reports, King's Bench. 5 vols.
Burt. Comp.	Burton's Compendium of the Law of Real Property.
Byth. & Jarm. or Jar. Conv.	Bythewood and Jarman's Conveyancing.
C. B.	Manning, Granger, and Scott's Common Bench Reports.
Ch.	{ Chancery Division (Law Reports), the figures in brackets refer to the year of the report.
Ch. Div.	Chancery Division (Law Reports).
Cherry & Mar.	Cherry and Marigold on the Land Transfer Acts.
Chit. Cont.	Chitty on the Law of Contracts.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords.
Co. Lit.	Coke upon Littleton.
Com. Dig.	Comyn's Digest.
Coote, Mort.	Coote on the Law of Mortgages.
Darby & Bos.	Darby and Bosanquet on the Statutes of Limitations.
Dart's V. and P.....	Dart's Law of Vendors and Purchasers.
David. Conv.	Davidson's Precedents in Conveyancing, with Notes.

David. Conc. Pr.	Davidson's Concise Precedents in Conveyancing.
D. & J.	De Gex and Jones' Chancery Appeals.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports.
De G. & S.	De Gex and Smale's Reports. 5 vols.
Dr.	Drewry's Reports. 4 vols.
Dr. & Sm.	Drewry and Smale's Reports.
E. & B.	Ellis and Blackburn's Queen's Bench Reports.
Elph. Int. Conv.	Elphinstone's Introduction to Conveyancing.
Eq.	Equity Cases (Law Reports).
Esp.	Espinasse's Nisi Prius Reports.
Everst & St. on Estop.	Everst and Stode on the Law of Estoppel.
Farw. Pow.	Farwell's Concise Treatise on Powers.
Fearn Cont. Rem.	Fearne's Contingent Remainders, &c.
Fry on Sp. Perf.	Fry on the Specific Performance of Contracts.
Gl. & J.	Glyn and Jameson's Bankruptcy Reports.
Godd. Easem.	Goddard on the Law of Easements.
Green. R. P. Stats.	Greenwood's Real Property Statutes.
Hayes and Jarm. Conc. Wills	{ Hayes and Jarman's Concise Forms of Wills, with Notes.
Hughes' Conv.	
H. & C.	Hurlestone and Coltman's Reports, Exchequer.
H. & N.	Hurlestone and Norman's Reports, Exchequer.
J. & H.	{ Johnson's and Heming's Reports in court of Wood, V.C. 2 vols.
Jac.	
Jarm. or Jar. Wills	Jacob's Reports, Chancery. 1 vol.
Jur.	Jarman on the Law of Wills, &c.
	Jurist Reports.
K. & J.	Kay and Johnson's Reports of decisions of Wood, V.C.
Key & Elph.	Key and Elphinstone's Precedents in Conveyancing.
L. C. Conv.	Leading Cases in Conveyancing, by Tudor.
L. C. Eq.	Leading Cases in Equity, by White and Tudor.
Lewin on Trusts	Lewin on the Law of Trusts and Trustees.
Lindley (or Lind.) Part. ...	Lindley on the Law of Partnership.
Lit. Ten.	Littleton's Tenures.
L. J.	Law Journal Reports.
L. Rep. (or L. R.)	Law Reports.
L. T. R.	Land Transfer Rules, 1898 and 1899.
L. T. Rep. N. S.	Law Times Reports, New Series.
Lush, Husb. & W.	Lush on the Law of Husband and Wife.
M. & W.	Meeson and Welsby's Reports, Exchequer.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery.
Macq. H. & W.	Macqueen on the Law of Husband and Wife.
McSwinn. Mines ...	McSwinn on Mines and Minerals.
Madd. or Mad.	Maddock's Reports, Vice-Chancellor's Court.
Mer.	Merivale's Reports, Chancery.
Moo. P. C.	Moore's Privy Council Reports.
Myl. & Cr.	Mylne and Craig's Reports, Chancery.
Myl. & K.	Mylne and Keene's Reports, Chancery.
N. C.	Non-Contentious Business in Probate Practice.
Ord.	Orders of the Rules of Court.

P.....	{ Probate, &c., Division (Law Reports), the figures in brackets refer to the year of the report.
P. Wms.	Peere Williams' Reports, mostly Chancery. 3 vols.
Phill.	Phillips' Reports, Chancery. 2 vols.
Platt, Leases	Platt on the Law of Leases.
Platt, Coven.	Platt on the Law of Covenants.
Pollock, Partn.	Pollock's Digest of the Law of Partnership.
Prid. Conv.	{ Prideaux's Precedents in Conveyancing, with Dissertations.
Pr. Div.	Reports in the Probate Division.
Q. B.	{ Queen's Bench Division (Law Reports), the figures in brackets refer to the year of the report.
Q. B. Div.	Queen's Bench Division—(Law Reports).
Redm. & Ly. L. & T.	Redman and Lyons' Law of Landlord and Tenant.
R. & M.	Russell and Mylne's Reports, Chancery. 2 vols.
Rep.	Lord Coke's Reports.
Robbins, Mortg.	Robbins on the Law of Mortgages.
Rop. Leg.	Roper on the Law of Legacies, &c.
S. & S.	{ Simons and Stuart's Reports, Vice-Chancellor's Court. 2 vols.
Scriv. Cop.	Scriven on the Law of Copyholds.
Scrut. M. S. Act.	Scrutton on the Merchant Shipping Act.
Shep. Touch.	Shepherd's Touchstone of Assurances.
Sim.	Simon's Reports, Vice-Chancellor's Court.
Sm. Comp.	{ Smith's (Josiah W.) Compendium of the Law of Real and Personal Property.
Sm. Man.	Smith's (Josiah W.) Manual of Equity Jurisprudence.
Sm. L. C.	Smith's Leading Cases on various Branches of the Law.
Snell's Eq.	Snell's Principles of Equity.
St. C.	Stephen's Commentaries on the Laws of England.
St. Eq.	{ Story's Equitable Jurisprudence, English edition by W. E. Grigsby.
Str.	Strange's Reports in all Courts.
Sug. Con. V.	{ Sugden's (Lord St. Leonards) Concise View of the Law of Vendors and Purchasers.
Sug. Pow.	Sugden (Lord St. Leonards) on Powers.
Sug. R. P. Statu.	{ Sugden's (Lord St. Leonards) Treatise on the Real Property Statutes.
Sug. V. & P.	Sugden's Law of Vendors and Purchasers.
Swans.	Swanston's Reports, Chancery.
T. R.	Durnford and East's Term Reports, King's Bench.
Tay. Ev.	Taylor on the Law of Evidence.
Theob. Wills	Theobald on the Law of Wills.
Tud. Ch. Trusts.	Tudor's Law of Charitable Trusts.
Turn. & R.	Turner and Russell's Reports.
V. & B.	Vesey and Beame's Reports, Chancery.
Ves.	Vesey, Junior's, Reports, Chancery.
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ERRATA ET ADDENDA.

- Page 15, note (b), line 9, for "46 & 47 Vict. c. 75" read "45 & 46 Vict. c. 75."
- Page 25, note (b), for "*Elliott v. Merriman*" read "*Elliott v. Merryman*."
- Page 28, note (g), for "*Re Chowner*" read "*Re Chawner*."
- Page 31, note (f), for "*Re Culverhouse; Cook v. Cook*" read "*Re Culverhouse; Cook v. Culverhouse*."
- Page 34, note (b), *Nutt v. Easton* has been affirmed (1900) 1 Ch. 29; 69 L. J. 46, Ch.; 81 L. T. Rep. N. S. 530, C. A.
- Page 78, line two from bottom, after "be abstracted" add "in chief." And in note (h), on the same page, add "*Re Stamford, &c., Banking Company and Knight's Contract* (1900) 1 Ch. 287; 69 L. J. 127, Ch.; 81 L. T. Rep. N. S. 708; 48 W. R. 244."
- Page 92, note (a), *Westmorland (Earl) v. New Sharlston Colliery Company* has been affirmed by the House of Lords, sub. nom. *New Sharlston Colliery Company v. Earl of Westmorland* (82 L. T. Rep. N. S. 725).
- Page 96, note (c), for "*Wellet*" read "*Willet*."
- Page 146, note (c), after "*Coatsworth v. Johnson*" add "see also *Manchester Brewery Company v. Coombs* (82 L. T. Rep. N. S. 347)."
- Page 154, line 16 from bottom, add "And by 63 Vict. c. 7, s. 10, when the purchaser, in addition to the consideration on which duty is chargeable, covenants to make improvements to the property conveyed, &c., no further duty is chargeable."
- Page 264, note (a), after "*Richardson v. Harris*" add "*Davies v. Jenkins* (1900) 1 Q. B. 133; 69 L. J. 187, Q. B.; 81 L. T. Rep. N. S. 788; 48 W. R. 286)."
- Page 279, note (l), line two, for "66 L. J. 809 Ch." read "66 L. J. 809, Q. B."
- Page 310, note (c), *Anderson v. Vicary*, has been affirmed by the Court of Appeal (1900) 2 Q. B. 287; 69 L. J. 713, Q. B.
- Page 338, line 15, for "Schedule to the Act" read "Schedule to the Agricultural Holdings Act, 1900."
- Page 341, note (h), although *Gentle v. Faulkener*, 68 L. J. 848, Q. B., has been reversed by the Court of Appeal (1900) 2 Q. B. 267, this fact does not affect the proposition in the text, in support of which the case is cited. The decision in the Court below went beyond the effect of a legal assignment, and decided that the covenant not to assign was broken by the lessee executing a declaration of trust of the premises leased. And it is on that ground that the decision was reversed. There is sufficient in the judgment of the Court of Appeal, and also in that in the case of *Horsey Estate v. Steiger*, cited in note (g) on this page, to support the statement in the text.

Page 350, line 2, *add* " But if the nuisance is caused by the lessor himself, that may amount to a breach of the covenant." (*Tebb v. Cave* (1900) 1 Ch. 642; 69 L. J. 282, Ch.; 82 L. T. Rep. N. S. 115; 48 W. R. 318.)

Page 433, note (c), *add* " but see *Re Duke of Norfolk's Estates* (1900) 1 Ch. 461; 69 L. J. 236, Ch."

Page 455, note (c), for "*Rochow*" read "*De Rochow*."

Page 466, line 24, for " and there is occasion " read " and there is no occasion."

Page 471, note (d), although *Vidits v. O'Hagan* (80 L. T. Rep. N. S. 794) has, on the facts, been reversed by the Court of Appeal (1900) (2 Ch. 87; 69 L. J. 507, Ch.) the statement in the text, for which the above case (with that of *Edwards v. Carter*) is cited in support, remains good law, being fully supported by the latter case, and recognised by the Court of Appeal.

Page 513, line 27, *add* " It has also been held that where a mortgagee was in possession of the mortgaged property and devised it in fee specifically, the specific devise showed that it was the testator's intention to pass his interest in the mortgage debt to the devisee. (*Re Carter* (1900) 1 Ch. 801; 69 L. J. 426, Ch.; 82 L. T. Rep. N. S. 526; 48 W. R. 555)."

Page 544, note (a), for "*Warton v. Barker*" read "*Wharton v. Barker*."

A CONCISE TREATISE

ON THE

LAW AND

PRACTICE OF CONVEYANCING.

CHAPTER I.

OF THE MODES OF ACQUIRING, AND OF THE CAPACITY TO CONVEY AND PURCHASE REAL ESTATE.

THE different modes by which property can be acquired may be divided into two great classes—viz., title by purchase and title by descent. A title by purchase is said to include in its scope that of occupancy, conveyance, devise, forfeiture, partition, elegit, bankruptcy, and inclosure. And title by descent, it is said, includes not only cases where the property is cast upon the heir on intestacy, but also escheat, dower, and curtesy. However, it may be doubted whether descent includes escheat, dower, and curtesy; and whether purchase includes inclosure, elegit, and bankruptcy. It is, therefore, more comprehensive to classify the modes by which property may be acquired into title by the act of law and title by the act of the parties.^(a)

As to the persons who may convey and purchase real estate, as a general rule, all persons of full age and sound mind may alien their lands. To this rule there are certain exceptions.

Corporations.

Corporations are either aggregate or sole, and also either lay or ecclesiastical. A corporation aggregate consists of two or more persons at the same time, as the mayor and corporation of a borough; a corporation sole consists of one person only and the successors, as a bishop or vicar.^(b)

(a) See 1 Steph. Com., ch. 10.

(b) 2 Bl. Com. 470.

Corporations may purchase land, yet unless they have a licence from the Crown, or the authority of some statute or charter, they cannot hold the land in perpetuity, it being forfeited to the Crown, or other lord of the fee.^(a) And the power of alienation of corporations is now regulated by various statutes.

Thus, the sale of Crown lands is now vested in the Commissioners of Woods and Forests, and is chiefly regulated by 10 Geo. 4, c. 50, and amendment Acts. The 10 Geo. 4, c. 50, ss. 34 *et seq.*, contain provisions as to sales. Sect. 45, which enabled the Commissioners to make grants of land for churches, &c., is, however, repealed and replaced by sect. 5 of 57 & 58 Vict. c. 43.

Grants by corporations must be by deed under their common seal.^(b)

As to municipal corporations, they may, by the 45 & 46 Vict. c. 50, contract for the purchase of and hold land not exceeding, in the whole, five acres, either in or out of the borough, and build thereon a town hall, council house, or other building necessary for borough purposes: (sect. 105). And where a municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the Local Government Board,^(c) purchase or acquire and hold any land, in such manner and on such terms and conditions as the Board approves. The provisions of the Land Clauses Consolidation Acts, 1845, 1860, and 1869, relating to the purchase of land by agreement, &c., are to extend to all purchasers of land under this sect. (sect. 107).

As to sales by such corporations the council cannot, unless authorised by statute, sell, mortgage, or alien any corporate land without the like approval, except the making of such leases as are specified in sects. 108 and 109 of 45 & 46 Vict. c. 50, which will be shown, *post*, tit. "Leases."

As to assurances for charitable uses^(d), prior to the Mortmain and Charitable Uses Act, 1888, such assurances were regulated by the 9 Geo. 2, c. 36, commonly called the Mortmain Act, and certain amendment Acts. The effect was that no land or money to purchase land could be given for the benefit of any charitable use, save by deed executed in the presence of two credible witnesses twelve calendar months before the grantor's death, and enrolled in chancery within six calendar months after execution, and take effect in possession immediately from the making thereof without power of revocation. Stock in the funds must have been transferred within six calendar months before the death of the grantor. But *bond fide* assurances for value were not to be avoided by the grantor's death within the twelve and six months respectively. Certain universities and colleges were also excepted.

By the Mortmain and Charitable Trusts Act, 1888 (51 & 52 Vict. c. 42), however, the previous Acts, relating to mortmain and charitable uses, were repealed to the effect set out in the schedule thereto, with a saving of rights and obligations arising under the repealed Acts (sect. 13), which,

(a) 2 Bl. Com. 318; 1 Steph. Com. 474, 10th edit.; 51 & 52 Vict. c. 42, ss. 1, 2; 54 & 55 Vict. c. 73.

(b) Com. Dig. "Franchise" (F.) 18.

(c) 51 & 52 Vict. c. 41, s. 72.

(d) See *post*, tit. "Wills."

with certain amendments are re-enacted. By this Act, as modified by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73); and subject to certain exceptions, to be presently noticed, every assurance of land (not being of copyhold or customary tenure) to or for the benefit of any charitable uses, or of personal estate (not being of stock in the public funds) to be laid out in the purchase of land for the benefit of any charitable uses, must be (1) by *deed* executed in the presence of at least two witnesses; and (2) if the assurance is of land or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration^(a), it must be made at least twelve months before the death of the assurator, including the days of making the assurance and of the death; (3) if the assurance is of stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made by transfer thereof in the public books kept for the transfer of stock at least six months before the death of the assurator, including the days of the transfer and of the death: (sect. 4, sub-sects. 1, 6, 7, 8); (4) the assurance must be made to take effect in possession for the charitable uses specified immediately from the making thereof; and (5) be without any power of revocation, reservation, or condition for the benefit of the assurator, or any person claiming under him, save as provided by the Act. (6) And by the Act the assurance may contain the following provisions, so however that they reserve the same benefits to persons claiming under the assurator as to the assurator: (i.) a grant or reservation of a peppercorn or other nominal rent; (ii.) of mines or minerals; (iii.) of any easement; (iv.) covenants or provisions as to the erection or repair, &c., of buildings, the formation or repair of streets, drainage or nuisances, &c., for the use and enjoyment as well of the land comprised in the assurance as of other adjacent land; (v.) a right of entry on non-payment of rent or breach of covenant, &c.: (sect. 4, sub-sects. 2, 3, 4); (7) assurances of land or of personal estate, other than stock in the public funds, must be enrolled in the central office of the Supreme Court within six months after execution. If the assurance of land is by one instrument, and the declaration of uses by another, the latter instrument must be enrolled. If the provisions of the Act are not complied with, the assurance is void. But where there has been an omission to enroll a deed within proper time the omission may be remedied in certain cases: (sect. 4, sub-sects. 4, 9, and sect. 5).

By 54 & 55 Vict. c. 73, "land" in the Mortmain and Charitable Uses Act of 1888, and in this Act is to include tenements and hereditaments, corporeal or incorporeal of any tenure, but not money secured on land or other personal estate arising from or connected with land, and the definition of land in the Act of 1888 is repealed (sect. 3).

Where land has already been dedicated to charitable uses, the

(a) This consideration may consist wholly or partly of a rent, rentcharge, or other annual payment in perpetuity or for a term of years, reserved to the vendor, or any other person, with or without a right of re-entry for non-payment thereof, as well as a consideration actually paid upon or before the making of the assurance (see sect. 4, sub-sect. 5; sect. 10, sub-sect. iv.).

conveyance of such land to other trustees or to any other charity does not, it seems, fall within the purview of the Mortmain Acts, and does not therefore require the formalities above detailed.^(a)

Exemptions.—The Mortmain, &c., Act, 1888 (51 & 52 Vict. c. 42), also makes the following exemptions from the foregoing requisites as to licences in mortmain and as to assurances to charitable uses, contained in sects. 1 to 5 (*supra*): An assurance by deed of land of any quantity, or by will of land of the quantity mentioned, *infra*, for the purposes only of a public park, a school-house, for an elementary school, a public museum,^(b) or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only. The quantity of land which may be assured by will under this section must not exceed twenty acres for any one public park, and not exceeding two acres for any one public museum, and not exceeding one acre for any one school-house. But a will containing such an assurance, and a deed containing such an assurance and made *otherwise than* in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assurator (or be a reproduction of a devise in a previous valid will so executed), and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in the case of a deed, the execution of the deed (sect. 6, sub-sects. 1, 2, 3).

Nor do the conditions under which assurances may be made to charitable uses, contained in sects. 4 and 5 of 51 & 52 Vict. c. 42, apply to (1) an assurance of land or personal estate to be laid out in the purchase of land for any of the universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges thereof; or for any of the colleges of Eton, Winchester, and Westminster, for the better support of the scholars upon the foundations thereof, or for the warden and scholars of Keble college (sect. 7).

(2) Nor to an assurance, otherwise than by will, to trustees for any society, &c., for religious purposes, or for the promotion of education, art, literature, science, or other like purposes, of land not exceeding two acres for the erection thereon of a building for such purposes, &c., such assurance to be made in good faith and for full and valuable consideration. The trustees may, at any time, have the instrument enrolled in the central office of the Supreme Court (sect. 7).

And by 43 Geo. 3, c. 108, s. 1, land not exceeding five acres, or personalty not exceeding 500*l.*, may be given by deed duly enrolled, or by will duly executed, three calendar months before the death of the donor, for the erection, repairing, or providing a church or chapel where the liturgy of the Church of England is used, or a mansion house for the residence of the minister, &c.

It will be noticed by the Acts above set out, land in limited quantities

(a) *Ashton v. Jones*, 28 Beav. 460.

(b) As to the interpretation of the terms "public park," &c. (see sect. 6, sub-sect. 4).

for specified purposes may be given by will for charitable uses. And by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), land without limit of quantity may be given by will for any charitable use, but (save as by the Act provided), such land, notwithstanding anything in the will to the contrary, must be sold within one year from the testator's death, or such extended period as may be determined by the High Court or a Judge thereof, or the Charity Commissioners (sects. 5, 6). A direction by will to lay out personal estate in the purchase of land for charitable uses is, save as by the Act provided, nugatory, and the charity takes such personal estate (sect. 7).

The Court, Judge, or Commissioners, however, if satisfied that the land so devised or directed to be bought, is required for actual occupation for the charity and not as an investment, may order its retention or acquisition (sect. 8).

The Act applies to the will of a person made before the operation of the Act, if he dies after the Act.^(a) And a gift of land in remainder to a charity is good under the Act.^(b)

As to what the word land includes, see *ante*, p. 3.

By 51 & 52 Vict. c. 42, s. 9, any assurance of land which is thereby required to be by deed may be made by a registered deposition under the Land Transfer Act, 1875, and any amendment Act, and exempts it from the provisions as to execution in the presence of witnesses and enrolment in the central office.^(c)

And by 55 & 56 Vict. c. 11, a further exemption is made of an assurance by deed of land to any local authority (*i.e.*, county council, council of a municipal borough, &c.), for any purpose for which such authority is empowered by act of Parliament to acquire land. And by 55 & 56 Vict. c. 29, a further exemption is made of land required and taken for the purposes of technical and industrial institutions (sects. 5, 10). So a company registered under the Joint Stock Companies Act 1862, may acquire and hold lands (sects. 18, 21, *infra*). And under the operation of sect. 8 of 51 & 52 Vict. c. 42, dispositions of land for certain purposes are exempted wholly or partially from the operation of the Act. Thus, under 4 & 5 Vict. c. 38 (and amendment Acts), it is provided that on the grant and endowment of sites for schools, as provided by the Act, one witness only is sufficient for such conveyance, and the death of the donor or grantor within twelve calendar months from the execution of the deed does not render it void.^(d) The Act to afford further facilities for the conveyance of land for sites for places of religious worship and for burial places contains similar provisions as to witnesses

(a) See sect. 9; *Re Bridger*; *Brompton Hospital v. Lewis* (1894), 1 Ch. 297; 63 L. J. 186, Ch.; 70 L. T. Rep. N. S. 204; 42 W. R. 179, C. A.

(b) *Re Hume* (1895), 1 Ch. 422; 64 L. J. 267, Ch.; 72 L. T. Rep. N. S. 68; 43 W. R. 291, C. A.

(c) See hereon, Land Transfer Rules, 1898, r. 96, stated *post*, tit. "Land Transfer Acts and Rules."

(d) See 4 & 5 Vict. c. 38, s. 10; 7 & 8 Vict. c. 37, s. 3; 51 & 52 Vict. c. 42, s. 8.

and death within twelve calendar months.(a) But enrolment of such deeds seems to be necessary.(b) Where, however, an assurance of land is made under 51 & 52 Vict. c. 42, s. 6, it must, unless it be a deed for valuable consideration, be made twelve months before the death and enrolled in the books of the Charity Commissioners as stated *ante*, p. 4.(c)

As to sales.—By the Universities and College Estates Acts, 1858 and 1860 (21 & 22 Vict. c. 44, s. 1; and 23 & 24 Vict. c. 59, s. 7), restricted powers of sale, exchange, and enfranchisement of their lands are given to the Universities of Oxford, Cambridge, and Durham, and their colleges, and to the colleges of Winchester and Eton, the purchase money to be applied as in the Acts mentioned.

By 61 & 62 Vict. c. 55, however, so far as regards the universities and colleges to which the above Acts apply, and for the purposes of sale, enfranchisement, exchange, partition and leasing, a university, or college may exercise any of the powers conferred on tenants for life by the Settled Land Acts, 1882 to 1890, and for those purposes the provisions of the Acts mentioned in sched. 1, part 1, to this Act are to apply subject to part 2; but the powers of sale, enfranchisement, exchange, and partition, and the power of granting building leases with the option of purchase are not to be exercised without the consent of the Board of Agriculture; and capital money payable on any such sale, &c., is to be paid to the Board of Agriculture (sects. 1, 7).

Sect. 2 makes provision for the application of capital money, and sects. 3 and 4 for borrowing money, &c.; and by sect. 5 the board may, if they think fit, dispense with a surveyor's report.

By sect. 8, and sched. 4, sects. 1, 3, to 20, and other sections of 21 & 22 Vict. c. 44 are repealed, as also sects. 2, 3 and 6 of 23 & 24 Vict. c. 59.

The Act 14 & 15 Vict. c. 104, s. 1 (continued and amended by several other statutes,(d) gives power to ecclesiastical corporations sole and aggregate, with the written approval of the Church Estates Commissioners, to sell, enfranchise, or exchange their lands (sect. 1). The purchase money, &c., is to be laid out as in the Act mentioned (sect. 6).

By the Charitable Trusts Act, 1885 (18 & 19 Vict. c. 124), s. 29, trustees of a charity cannot make any sale or charge of the charity estate (save a lease as therein specified) without the authority of an Act of Parliament, or of a Court, or Judge, or according to a scheme legally established, or the approval of the Board.(e) By sect. 1, this Act and the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), are to be

(a) 36 & 37 Vict. c. 50, s. 4.

(b) See 4 & 5 Vict. c. 38, s. 16; 36 & 37 Vict. c. 86, s. 13, sub-sect. 3.

(c) There are other exceptions. See 1 Chit. Stats. 66 n., 5th edit.

(d) 17 & 18 Vict. c. 116; 20 & 21 Vict. c. 74; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124, s. 116.

(e) See *Fell v. Official Trustee of Charity Lands*, 67 L. J. 385, Ch. ; 78 L. T. Rep. N. S. 474; (1898) 2 Ch. 44.

construed together as one Act. Sect. 62 of the latter Act specifies certain exemptions from the operation of the Act. See also sect. 27.

Joint Tenancy of Corporations.—By the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), a body corporate may acquire and hold any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy, they are to be entitled to the property as joint tenants. But the acquisition and holding of property by a body corporate in joint tenancy is to be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty (sub-sect. 1).

Where a body corporate is joint tenant of any property, then on its dissolution the property is to devolve on the other joint tenant (sub-sect. 2).

Parish Officers, &c.

Churchwardens, although not a corporation in the full sense of the term, yet they are a *quasi*-corporation for the purposes of holding land and the devolution of property.^(a) And by sect. 17 of 59 Geo. 3, c. 12, they and the overseers of the poor may hold land in the nature of a body corporate for the parish; and sect. 12 of the Act (as amended by 1 & 2 Will. 4, c. 42, s. 1) empowered the churchwardens and overseers of the poor of the parish, with the consent of the vestry to purchase fifty acres of land for the employment of the poor. This power was by 5 & 6 Will. 4, c. 69, in future to be exercised by the overseers of the poor in any parish not under the management of a Board of Guardians, and by the guardians of the poor of any union or parish formed or established by any statute or local Act (sect. 4). And by the Local Government Act, 1894 (56 & 57 Vict. c. 73), sect. 5, the legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish (except property connected with the affairs of the Church or held for an ecclesiastical charity), is to vest in the Parish Council^(b), if one, &c. (sub-sect. 2). So by sect. 6, the powers, &c., of the vestry of the parish are transferred to the Parish Council (save as therein excepted); also the powers, &c., of the overseers, &c., with respect to the holding, &c., of parish property (except as in the Act excepted); also the powers exercisable with the approval of the Local Government Board by the Board of Guardians, &c., in respect to the sale, &c., of parish property (sub-sect. 1; see also sect. 52). The sale of parish property is chiefly regulated by 5 & 6 Vict. c. 18. As to London, see 62 & 63 Vict. c. 14, ss. 4, 5, 6, 23.

So the Sanitary Authority under the Public Health Act, 1875 (38 & 39 Vict. s. 55), may purchase and hold lands for the purposes authorised by the Act (sects. 7, 175, 176); the Act also confers a power of sale or

(a) See previous Note (e).

(b) If there be no separate Parish Council, see sect. 19, sub-sect. 7.

exchange upon such authority (sect. 175). And by the Local Government Act, 1888 (51 & 52 Vict. c. 41), a County Council may acquire lands for the purposes of their powers and duties (sect. 65); and may, with the consent of the Local Government Board, borrow money for such purpose (sect. 69); and may also, with the like consent, sell any land (sect. 65).

So by the Local Government Act, 1894 (56 & 57 Vict. c. 73), a Parish Council may acquire land for the purposes of the Act (sects. 8, 9), and with the consent of the County Council and the Local Government Board may borrow money for such purposes (sect. 12). So a Parish Council may sell or exchange any land or buildings vested in them, subject, however, to the consent, &c., as in the Act mentioned (sect. 8, sub-sect 2).

So by the Allotments Act, 1887 (50 & 51 Vict. c. 48, amended by 53 & 54 Vict. c. 65), land may be acquired for the purposes of these Acts and subject to the conditions therein specified (sects. 2, 3); and money may be borrowed for such purpose (sect. 10, sub-sects. 4, 5), and power is also given to sell land when not required for the purposes of the Act (sect. 11).

So by the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), a county council may, subject to the provisions of the Act, acquire lands for small holdings (sects. 1, 3), and offer the small holdings for sale in accordance with the rules under the Act (sect. 4), to be held subject to the conditions specified (sect. 9). On a purchase the county council are to apply to register the title under the Land Transfer Act, 1875, with an absolute title (sect. 10). A right of re-purchase is given if the land is diverted from agriculture, first by the county council, and then by the owners of the land from which the holding was severed &c. (sect. 11). And the county council may sell superfluous or unsuitable land (sect. 15). The leasing powers of corporations, &c., will be considered subsequently.

Public Companies.

By the Land Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 106; 32 & 33 Vict. c. 18; and 46 & 47 Vict. c. 15), where the promoters of public companies require lands for works of a public nature, provision is made for obtaining the lands; and also for their conveyance from parties under disability, or who are unwilling to sell their lands. The company may proceed either by agreement with the owners of the lands (sects. 6 to 15), or under their compulsory powers (sects. 16, *et seq.*). After the agreement of purchase is made (sect. 6), or after the promoters of the undertaking have given the parties notice of their intention to purchase the lands, called a notice to treat, under their compulsory powers (sect. 18) (as where a railway company desires to purchase lands for a railway), the Act provides that all parties seised or entitled may convey, and particularly corporations, tenants in tail or for life, married women seised in their own right, or entitled to dower, guardians, committees of lunatics, trustees for charitable or other purposes, executors, and administrators, and all persons entitled to the receipt of the rents and profits of such lands in possession, or subject to any estate in dower, or for life, or years, or any less interest, may sell and

convey such lands; and, with the exception of married women entitled to dower, or lessees for life or years, or any less interest, may do so not only to the extent of their own interest but also on behalf of those entitled in remainder or reversion, &c. (sect. 7).

The statute also makes provision for assessing the compensation to be paid; and also for the application of the purchase money when lands are taken from persons under disability. Such compensation may be determined by agreement (sect. 6), by a jury, or arbitration, or a surveyor appointed by two justices, or by two surveyors, one nominated by the promoters of the undertaking and the other by the other party, and if they cannot agree, by a third surveyor appointed by two justices^(a) on the application of either party after notice to the other, or, if the amount is under £50, by two justices (sects. 9, 21, 22, 23, 58). The money is, where the parties have limited interests, &c., to be paid into the Bank of England, and until it can be applied (1) in redemption of the land tax; or (2) in paying off incumbrances on such land or on lands settled to the same uses as the land sold; or (3) in the purchase of other lands to be settled to the same uses as the land sold, or (4) if paid in respect of buildings, &c., as the court directs; or (5) in payment to the person absolutely entitled, it may be invested in Two and Three-quarters Per Cent Consolidated Stock or in Government or real securities: (sects. 69, 70; 52 Vict. c. 4.) Sums from 20*l.* to 200*l.* may be deposited in the bank or paid to trustees: (8 & 9 Vict. c. 18, s. 71.) If the amount does not exceed 20*l.* it may be paid to the parties entitled to the rents and profits for their own use and benefit, or if under disability to their husbands, guardians, &c. (sect. 72).

Money paid into court under sect. 69 may, by the Settled Land Act, 1882, if subject to a settlement, be applied as capital money under that Act (sect. 32).

After the promoters have deposited in the bank the purchase money, or compensation agreed, or awarded for the land taken, if the owner or statutory owner (person having a limited interest, &c.), fails to convey the land upon request, or fails to make a title, or cannot be found, the promoters may execute a deed poll which has the same effect as a conveyance by the owner or statutory owner (sects. 75 to 77).

If the promoters wish to enter upon the lands before an agreement is come to, or an award made, or verdict given, they may deposit in the Bank of England either the amount claimed or such a sum as may be fixed by a surveyor appointed by two justices^(b), and also give a bond with two sureties (to be approved by two justices if the parties differ) in a penal sum equal to the amount to be deposited, and upon such deposit being made and bond delivered or tendered to the non-consenting party the company may enter into possession (sect. 85).

(a) The 30 & 31 Vict. c. 127, s. 36, which enacts that the surveyor shall be appointed by the Board of Trade instead of by two justices applies only to sect. 85 of 8 & 9 Vict. c. 18, and railway companies.

(b) In the case of a railway company the appointment is made by the Board of Trade (30 & 31 Vict. c. 127, s. 36).

The cost of the conveyance and deducing and evidencing the title to the lands is borne by the promoters (8 & 9 Vict. c. 18, s. 82).

The conveyances of copyholds must be entered on the court rolls of the manor in which they are situate; and provision is made for their enfranchisement (sects. 95, 97).

Mines and minerals under the lands do not pass under a conveyance of the lands unless expressly mentioned.(a)

As to the sale of lands acquired by the promoters of the undertaking under the provisions of the Land Clauses Act, or a special Act, and which are not required for the purposes thereof, then, within the prescribed period, or if no period be prescribed within 10 years after the time limited by the special Act for the completion of the works, the promoters must absolutely sell and dispose of such superfluous lands(b), or in default they vest in the owners of the adjoining lands (sect. 127) and, unless such lands are situate within a town or are used for building purposes, they must first be offered for sale to the person then entitled to the lands from which they were severed, and on refusal, &c., next to the owners of lands immediately adjoining, &c. (sect. 128). This right of pre-emption must be claimed within six weeks after the offer of sale (sect. 129).

By the Companies Act, 1862 (25 & 26 Vict. c. 89), public companies incorporated under it, may hold lands (sect. 18), but if formed for the promotion of art, science, religion, charity, or other like object, not involving the acquisition of gain, the quantity held must not exceed two acres, except with the sanction of the Board of Trade (sect. 21).

Trustees of Friendly Societies.—By the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), a registered Society or branch may, if the rules permit, hold, purchase, or take on lease, in the names of the trustees, any land; and may sell, exchange, mortgage, or lease the same. But a benevolent society is not to hold land exceeding one acre (sect. 47). Sect. 48 provides as to copyholds.

Small Holdings Acquisition.—Connected with the power to acquire house property, the effect of the Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), may be briefly stated. Under the Act a local authority may advance money to a resident in a house for the purpose of enabling him to acquire the ownership thereof. The advance must not exceed four-fifths of the market value, nor 240*l.*; or in the case of a fee simple, or leasehold of not less than ninety-nine years unexpired, 300*l.*; and an advance is not to be made if the market value exceeds 400*l.* The amount advanced is to be repaid with interest, as in the Act is mentioned. And the conditions mentioned in the Act as to punctual payment, residence, insurance, &c., must be complied with. In case of default, powers are given to the local authority to either take possession of the house or

(a) Darts V. & P. 130, 6th edit. ; *et post.*

(b) See *Carrington (Lord) v. Wycomb Railway Company*, 3 Ch. App. 377; 37 L. J. 213, Ch.; 16 W. R. 404; *London and South Western Railway Company v. Gomm*, 20 Ch. Div. 562; 51 L. J. 530, Ch.

to order a sale. Other powers and conditions are contained in the Act, to which the reader is referred.

Infants.

The purchases and conveyances of infants are in general voidable only and not void. An infant's contracts will not, however, be enforced either for or against him.(a) And where the contract is a joint contract by an infant and an adult it will not be enforced against either the infant or the adult, if the adult has not been guilty of misrepresentation.(b) And though an infant can purchase, he may, on attaining twenty-one, adopt or abandon the contract at his option. And should he, either having attained twenty-one, die without exercising or relinquishing such option, or die under that age, the like option descends to his representatives.(c) No precise rule can be given as to the time within which an infant, after attaining twenty-one, must elect. However, he must repudiate a contract within a reasonable time after attaining his majority. What is a reasonable time depends upon the circumstances of each individual case.(d) When he elects to avoid a contract of purchase he should do so by way of disclaimer. If, however, he has paid a deposit he cannot, it seems, recover it back unless the vendor was guilty of fraud in procuring the contract.(e) And it seems an infant may become liable on his contracts if he fraudulently represents himself to be of full age, either as a vendor or a purchaser, if the court cannot restore the parties to their original footing.(f)

Nor can an infant as a general rule execute any conveyance which will bind him after he comes of age, or his heirs in the event of his dying under age, or of full age without having confirmed the transaction, if capable of confirmation.(g)

By the Infants Relief Act, 1874, no action can be brought upon any ratification made after full age, of any promise or contract made during infancy, whether there be or not any new consideration for such ratification after full age.(h) However, it seems that a contract respecting land or to settle personal property(i), is not within this section, and therefore such a contract is voidable only. The Act seemingly only applies to the three classes of contracts mentioned in sect. 1, viz.:

(a) *Flight v. Bolland*, 4 Russ. 298.

(b) *Lumley v. Ravenscroft*, 64 L. J. 441, Q. B.; 72 L. T. Rep., N. S. 382; 43 W. R. 584; (1895) 1 Q. B. 683.

(c) Darts V. & P. 29, 6th edit.; but see *post*, tit. "Settlements."

(d) *Whittingham v. Murdy*, 60 L. T. Rep., N. S. 956; *Edwards v. Carter*, (1893) A. C. 360; 69 L. T. Rep. N. S. 153; 63 L. J. 100, Ch.; *Farrington v. Forrester*, (1893) 2 Ch. 461; 69 L. T. Rep. N. S. 45; 62 L. J. 996, Ch.

(e) Darts V. & P. 30, 6th edit.; Fry, Sp. Perf. 215, 3rd edit.

(f) *Hannah v. Hodgson*, 5 L. T. Rep. N. S. 42; 9 W. R. 727; *Lemperier v. Lange*, 12 Ch. Div. 675; 41 L. T. Rep. N. S. 378; 27 W. R. 879; Simp. on Inf., 10 2nd edit.

(g) Dart's V. & P. 2, 6th edit.; but see *post*, tit. "Settlements."

(h) 37 & 38 Vict. c. 62, s. 2.

(i) *Whittingham v. Murdy*, 60 L. T. Rep. N. S. 956; *Edwards v. Carter*, *sup.*

contracts (1) for the payment of money lent; (2) contracts for goods supplied; and (3) accounts stated.(a)

An infant cannot exercise a power over real estate by deed unless it be a power simply collateral, that is one given to a person who has no interest in the property over which it is given, and the infant is of sufficient understanding (b); but as to personal property, he may, if of sufficient understanding, exercise by deed a power in gross; that is, where he takes an interest in the property over which the power extends, but which interest is not affected by the exercise of the power.(c) An infant cannot exercise a power by will, being prohibited by 1 Vict. c. 26, s. 7.

By 18 & 19 Vict. c. 43, a male infant over twenty years and a female infant over seventeen years, may, in contemplation of marriage, with the sanction of the Chancery Division of the High Court, make a valid settlement or contract for a settlement of his or her property, or property over which he or she has any power of appointment, real or personal, in possession or expectancy, as will be more fully shown, *post*, tit. "Settlements."

By the custom of gavelkind an infant at the age of fifteen may convey land, which he took by descent, by feoffment with livery of seisin.(d)

By 40 & 41 Vict. c. 18, s. 49, and 45 & 46 Vict. c. 38, ss. 59 and 60, facilities are given for the sale, exchange, &c., of settled lands vested in an infant in possession. This subject will, however, be more fully noticed in subsequent pages.

By the Land Transfer Act, 1875, the guardian of an infant may make any application, give any consent, or do any act, &c., relating to any land or charge under the act, which the infant could do if not under disability.(e)

And in various special cases also, for the purpose of making a title to lands, infants, or their guardians, have been empowered by various statutes to sell and convey lands.(f) So power is given to the Chancery Division of the High Court to make orders in the case of infants in whom lands are vested in trust, or by way of mortgage, vesting the lands in such persons and for such estates as the Court directs, which have the same effect as if the infant in each case had been of full capacity and had executed a conveyance to the effect intended in the orders. Or if more convenient a person may be appointed to convey.(g)

As to leases by infants, see *post*, tit. "Leases."

(a) *Duncan v. Dixon*, 44 Ch. Div. 211; 59 L. J. 437, Ch.; 62 L. T. Rep. N. S. 319; 38 W. R. 700.

(b) *Sug. Pow.* 47, 177, 8th edit.; *Dart's V. & P.* 3, 6th edit.

(c) *Re D'Angibau*, 15 Ch. Div. 228; 49 L. J. 756, Ch.; 43 L. T. Rep., N. S. 176; 28 W. R. 930.

(d) *Dart's V. & P.* 4, 6th edit.; 8 & 9 Vict. c. 106, s. 3.

(e) 38 & 39 Vict. c. 87, s. 88; *et post*, tit. "Land Transfer Acts."

(f) See *Dart's V. & P.* 3, 6th edit.; and see 11 Geo. 4 & 1 Will. 4, c. 47, s. 11; 2 & 3 Vict. c. 60; 4 & 5 Vict. c. 38, s. 5; 8 & 9 Vict. c. 18, s. 7; 31 & 32 Vict. c. 40, s. 3; 39 & 40 Vict. c. 17, s. 6; 36 & 37 Vict. c. 50, s. 3.

(g) 56 & 57 Vict. c. 53, ss. 26, 28, 32, 33, 34.

Lunatics.

A contract made by a person of unsound mind is not voidable at that person's option. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A person who seeks to avoid a contract on the ground of his insanity must prove (1) his incapacity, and (2) the other parties' knowledge of it.(a)

Where a person becomes a lunatic after entering into a contract relating to his property, application may be made under the Lunacy Act, 1890 (53 Vict. c. 5), by petition to the judge in lunacy for an order empowering the lunatic's committee to perform the contract, and in his name and behalf to execute and do all such assurances and things for giving effect to the order as the judge directs (sects. 120i, 124). So the judge may order the committee to sell, exchange, or make partition of the lunatic's property; also to exercise powers and give consents, even if the power is vested in the lunatic in the character of trustee or guardian (sects. 117, 120, 128).(b) And prior to the above statute, the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), empowered the court to authorise a sale of the lunatic's settled estate, or any timber, not being ornamental timber, growing thereon (sect. 16), on the application of the lunatic's committee (sect. 49). And by the Land Clauses Consolidated Act, 1845 (8 & 9 Vict. c. 18), s. 7, committees of lunatics are empowered to convey. So by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62, where a tenant for life is a lunatic, so found by inquisition, the committee of his estate may in his name and on his behalf, under an order in lunacy, exercise the powers of a tenant for life under the Act.

By the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 88, the committee of a lunatic's estate may make any application, give any consent, or do any act, &c., relating to any land or charge under the Act as the lunatic could do if not under disability.

So if a trustee become lunatic, similar orders may, under 53 Vict. c. 5, ss. 135-141, be made, as in the case of an infant trustee, stated *ante*, p. 12. The application in this case being made to the judge in lunacy.

The power of a lunatic to grant leases will be treated of subsequently.

Married Women.

A married woman cannot by her contracts render herself personally liable.(c) She may, however, by force of several statutes enter into binding contracts. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26, provides that in case of a judicial separation the wife shall, while so separated, be considered as a *feme sole* for the purposes of contract

(a) *Imperial Loan Company v. Stone* (1892), 1 Q. B. 599; 61 L. J. 449, Q. B.; 66 L. T. Rep. N. S. 556, C. A.; Dart's V. & P. 6, n., 31, 6th edit.

(b) See also 31 & 32 Vict. c. 40, s. 8; 39 & 40 Vict. c. 17, s. 6; 36 & 37 Vict. c. 50, s. 8.

(c) *Scott v. Morley*; 20 Q. B. Div. 120; 57 L. J. 43, Q. B.; 36 W. R. 67, C. A.

and wrongs, and suing and being sued; and sect. 25 provides that *from* the date of a sentence of judicial separation and while the separation continues, she shall be considered as a *feme sole* with respect to *property* which she may acquire or which may devolve upon her; but if she again cohabits with her husband, all property she is then entitled to is to be held to her separate use, subject to any agreement in writing between her and her husband while separate.

And by sect. 21, if the wife has obtained a protection order for desertion by her husband, she shall, during the continuance thereof, be and be deemed to have been during such desertion, in the like position in all respects with regard to property and contracts, &c., as if she had obtained a decree of judicial separation.

It will be noticed that sect. 25 of the above Act deals with property and contains words of futurity, while sect. 26 deals with contracts but not property; and sect. 21 deals with both contract and property.

It has been held on the construction of sects. 21 and 25, where a married woman, who was entitled to a life interest in certain property for her separate use, with a restraint on anticipation, obtained a protection order for desertion under sect. 21, and subsequently mortgaged her life interest and covenanted to pay the mortgage debt, that as her life interest devolved upon her *before* the desertion, the restraint on anticipation still attached, and that equitable execution on a judgment obtained on her covenant to pay could not issue.^(a)

By 58 & 59 Vict. c. 39, s. 5, where a magistrate makes an order that a married woman is no longer bound to cohabit with her husband, it has the effect of a decree of judicial separation on the ground of cruelty.

A married woman's powers of contracting are also dealt with by the Married Women's Property Act, 1893 (amending the Act of 1882), by which a contract thereafter entered into by a married woman (save as agent) is to be deemed to be entered into by her with respect to and to bind her separate property, as if she were a *feme sole*, whether she has or has not any separate property at the time of the contract. And it binds all the separate property which she then or thereafter is possessed of or entitled to, and may also be enforced against all property which she may thereafter while discoverable be possessed of, &c., unless there be a valid restraint against anticipation. However, the costs of any action, &c., *instituted by* her may be ordered to be paid out of the property notwithstanding the restraint, and be enforced by the appointment of a receiver and by a sale thereof.^(b) Before the Act of 1893 her contract had no effect unless she had *some* separate free property at the time of contracting.^(c) And where there was a restraint against anticipation

(a) *Hill v. Cooper*, (1893) 2 Q. B. 85; 62 L. J. 423, Q. B.; 69 L. T. Rep. N. S. 216; 41 W. R. 500, C. A.

(b) 45 & 46 Vict. c. 75, s. 1 (2), s. 19; 56 & 57 Vict. c. 63, ss. 1, 2.

(c) *Re Shakespeare*, 30 Ch. Div. 169; 53 L. T. Rep. N. S. 145; 55 L. J. 44, Ch.; 33 W. R. 744; *Stogden v. Lee* (1891), 1 Q. B. 661; 60 L. J. 669, Q. B.; 64 L. T. Rep. N. S. 494; 39 W. R. 467.

her contracts could not be enforced against the property even after her husband's death. (a)

The Married Women's Property Act, 1882, also provides for a married woman holding separate property and also as to her powers of disposition over it. By sect. 1 (1) she is in accordance with the provisions of the Act to be capable of acquiring, holding, and disposing by will, or otherwise, of any real or personal property in the same manner as if she were a *feme sole*, without the intervention of a trustee.

By sect. 2, every woman who marries *after* the commencement of the Act is entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after marriage.

By sect. 4, the execution of a *general* power by will by a married woman is to have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is liable under the Act.

And by sect. 5, every woman married *before* the commencement of the Act is entitled to have and to hold and dispose of in manner aforesaid as her separate property all real and personal property, her *title* to which, whether vested or contingent in possession, reversion or remainder, accrues *after* the commencement of the Act. (b)

Where, after a married woman obtained a protection order, she entered into a covenant (in 1880) to pay certain moneys, and assigned as security her income in certain property, which she took under several settlements, over part of which she had a general power of appointment, which she exercised by will in 1895, and died in 1896, it was held, on the construction of sects. 21, 25, and 26 of the Matrimonial Causes Act of 1857 and sect. 4 of the Married Women's Property Act, 1882, that she had power to contract as a *feme sole*, free from restriction, and that the funds appointed were assets for the payment of the debts so contracted. (c)

It has also been held upon the construction of sect. 5 of the Married Women's Property Act, 1882, that if a woman married before the commencement of the Act, had also before its commencement acquired a *title*, vested or contingent, in reversion or remainder, to property, such

(a) *Beckett v. Tasker*, 19 Q. B. Div. 7; 56 L. T. Rep. N. S. 636.

(b) Prior to the above statute certain property of a married woman was made separate property. By 33 & 34 Vict. c. 93, all wages and earnings subsequent to the Act are made separate estate, also her investments in savings banks, and the funds, &c. A woman married after the Act as to personal property to which she becomes entitled as next of kin or one of the next of kin of an intestate, or any sum of money not exceeding 200*l.* under any deed or will, it belongs to her for her separate use, and also the rents and profits of real estate descending to her, subject to any settlement affecting the same. This Act is now repealed, except as to any right acquired thereunder, by 46 & 47 Vict. c. 75, s. 22. We shall, however, refer to this subject more fully hereafter.

(c) *Re Hughes, Brandon v. Hughes*, 67 L. J. 279, Ch.; 78 L. T. Rep. N. S. 82; 46 W. R. 502; (1898) 1 Ch. 529; where *Hill v. Cooper*, *ante*, p. 14, was distinguished.

property is not made separate property by this sect., though it falls into possession after the Act.(a)

Sect. 19 of the Married Women's Property Act, 1882, provides that nothing in the Act is to interfere with or affect any settlement or agreement for a settlement made or to be made, before or after marriage, respecting the property of any married woman, or is to render inoperative any restriction against anticipation at present attached or hereafter to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument.

As to the restraint on anticipation or alienation, it may be applied to real or personal estate, and to a life interest or an absolute interest.(b) But it was formerly held that there could be no restraint on anticipation unless the property was also limited to the separate use of the woman. The restraint and the separate use were said to stand or fall together.(c) It has recently been held, however, that as to married women coming within the provisions of the Married Women's Property Act, 1882, the restraint is effectual although the property be not limited to her separate use; as that Act makes the property her separate property (d), as already shown.

The restraint may be imposed whether the woman be single or married, but it only operates during coverture. While unmarried she can alienate the property at her pleasure. The restraint ceases during widowhood, but will revive on a subsequent marriage if that appears to have been the intention(e); and when the marriage was dissolved by a decree of divorce it was held that the restraint revived on a subsequent marriage.(f) But a decree for a judicial separation does not remove an existing restraint on anticipation.(g)

A distinction has been taken between an absolute gift by will to the separate use of a married woman of a fund bearing income, as a gift of a sum of consols, and a like gift of a mere sum of money, followed in each case by a restraint on anticipation. In the case of the gift of the fund bearing income, it was held that the restraint operated during coverture(h); but that it did not do so in respect of the gift of the sum of cash.(i)

(a) *Reid v. Reid*, 31 Ch. Div. 402; 55 L. J. 294, Ch.; 54 L. T. Rep. N. S. 100; 34 W. R. 332; *Re Cuno*, 43 Ch. Div. 12; 62 L. T. Rep. N. S. 15.

(b) *Baggett v. Meux*, 1 Ph. 627; 15 L. J. 262, Ch.

(c) *Tullet v. Armstrong*, 1 Beav. 1; *Hulme v. Tenant* 1 L. C. Eq. 661, 709, 7th edit.

(d) *Re Lumley; ex parte Hood-Barrs* (1896) 2 Ch. 690; 65 L. J. 837, Ch.; 75 L. T. Rep. N. S. 236, C. A.

(e) *Hulme v. Tenant*, 1 L. C. Eq. 718, 7th edit.

(f) *Stroud v. Edwards*, 77 L. T. Rep. N. S. 280.

(g) *Wait v. Morland*, 38 Ch. Div. 135; 59 L. T. Rep. N. S. 185; 57 L. J. 655, Ch.; 36 W. R. 484.

(h) *Re Ellis*, L. R. 17 Eq. 409; 43 L. J. 444, Ch.

(i) *Re Clarke*, 21 Ch. Div. 748.

However, the question seems to be one of intention on the part of the testator to be gathered from his will.(a)

A married woman cannot by any device, or even by fraud, deprive herself of the protection afforded by a restraint on anticipation.(b) But the restraint ceases to attach to the income as soon as it becomes due and payable to her under the trusts of the settlement, although it may not have reached her hands.(c)

However, a judgment cannot be enforced against arrears of income of property of a married woman settled upon her for her separate use without power of anticipation which have accrued due after the date of the judgment.(d)

By 44 & 45 Vict. c. 41, s. 39, notwithstanding a married woman is restrained from anticipation, the Court may, if it thinks fit, when it appears to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

This section does not confer on the Court a general power of removing the restraint, but only enables the Court to make binding some particular disposition of her property notwithstanding the restraint, when the Court is of opinion that such disposition is beneficial to her.(e) The Court has removed the restraint in order to pay the wife's debts (f); but it will not do so if the debts are improperly incurred, as where money was borrowed from a money-lender.(g) And the Court cannot under this section order performance of an agreement entered into by a married woman restrained from anticipation, if when the application is made she has been divorced and her husband is dead; for she is not at the time of the application a married woman.(h) The Court may for good reason remove the restraint in order to pay the husband's debts, and if this be done, the husband is not bound to indemnify the wife, unless such a condition be part of the order.(i)

By 56 & 57 Vict. c. 53, s. 16, where any freehold or copyhold hereditaments are vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*.

A bare trustee seems to be one who has no interest in the property of

(a) *Re Bown*, 27 Ch. Div. 411; 53 L. J. 881, Ch.; 50 L. T. Rep. N. S. 796.

(b) *Bateman v. Faber* (1897), 2 Ch. 223; 77 L. T. Rep. N. S. 576; 67 L. J. 117, Ch.

(c) *Hood-Barrs v. Herriott* (1896) A. C. 174; 65 L. J. 352, Q. B.; 74 L. T. Rep. N. S. 353; 44 W. R. 481.

(d) *Re Lumley* (1896), 2 Ch. 690; 65 L. J. 837, Ch.; 75 L. T. Rep. N. S. 236; 45 W. R. 147, C. A.

(e) *Re Warren's Settlement*, 52 L. J. 928, Ch.; 49 L. T. Rep. N. S. 696, C. A.; *Re Jordan's Settlement*, *Kino v. Pickard*, 55 L. J. 330 Ch.; 54 L. T. Rep. N. S. 127.

(f) *Hodges v. Hodges*, 20 Ch. Div. 749; 46 L. T. Rep. N. S. 666.

(g) *Re Pollard's Settlement* (1896), 2 Ch. 552; 65 L. J. 796, Ch.; 75 L. T. Rep. N. S. 116, C. A.

(h) *Thomson v. Thomson*, 65 L. J. 80, P. & D.; (1896) P. 263; 74 L. T. Rep. N. S. 80; 45 W. R. 134.

(i) *Paget v. Paget* (1898), 1 Ch. 470; 67 L. J. 1, 266, Ch.; 78 L. T. Rep. N. S. 306.

which he or she is seized, nor any active duty to perform in respect to it.(a) After judgment for sale in an action for administration of the estate of which she is trustee she becomes a bare trustee within the statute.(b)

And irrespective of any legislative enactment where property is settled to the separate use of a married woman, without any restraint or alienation, she has, in equity, as incident to such estate, and without any express power, a complete right of alienation by instrument, *inter vivos*, or by will.(c)

And by the 45 & 46 Vict. c. 38, s. 61, sub-sects. 2, 6, where a married woman who, if she had been unmarried, would have been a tenant for life of settled property, is entitled for her separate use, or is entitled under any statute for her separate property, or as a *feme sole*, then she without her husband has the powers of a tenant for life under the Act,(d) and a restraint on anticipation in the settlement is not to prevent the exercise by her of any power under the Act. And by the 3 & 4 Will. 4, c. 74, s. 24, where the estate constituting a married woman protector of a settlement is settled to her separate use she may consent to an alienation without her husband's concurrence therein.(e)

So if a power of appointment be given to a woman, whether married or single, she may exercise such power without the consent or concurrence of any husband to whom she may then or thereafter be married.(f)

And prior to the Married Women's Property Acts, a married woman, not being tenant in tail, is by 3 & 4 Will. 4, c. 74, s. 77, enabled by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to release, surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any such lands or money ; and also to release or extinguish any power vested in or reserved to her in regard to any such lands or money &c. The husband, however, must concur in deed, and the deed be duly acknowledged by the wife (in the manner detailed *post*, tit. "Purchases"), unless his concurrence is dispensed with by order of the Court under sect. 91 of the Act.(g) If the married woman is a tenant in tail the deed must be in accordance with the provisions of sect. 40 of the Act. Prior to 3 & 4 Will. 4, c. 74, a married woman passed her interest in real estate by a fine.

Sect. 77 of the above Act also provides that the legal estate in copyhold land of a married woman, which, prior to this Act, could be passed

(a) *Christie v. Ovington*, 1 Ch. Div. 279.

(b) *Re Docwra*, 29 Ch. Div. 693 ; 54 L. J. 1121, Ch ; 53 L. T. Rep. N. S. 288 ; 33 W. R. 574.

(c) *Taylor v. Meads*, 4 De G. J. & S. 597 ; 34 L. J. 203, Ch. ; 12 L. T. Rep. N. S. 6 ; 13 W. R. 394.

(d) See *post*, tit. "Settlements."

(e) *Kerr v. Brown*, 33 L. T. Rep. O. S. 179 ; 1 Johns. 138.

(f) Sug. Pow. 153, 154, 163, 8th edit.

(g) See hereon *Fowke v. Draycott*, 29 Ch. Div. 996 ; 54 L. J. 977, Ch. ; 33 W. R. 701.

by her surrender with her husband's concurrence, is still to be so passed. She may also, contrary to the usual custom, pass her equitable interest in copyholds by surrender, but by sect. 90 the husband must join, and she must be examined separately by the person taking the surrender as to her consent. It is not necessary, however, that she should pass her equitable estate in copyholds by surrender, for it may be passed by deed acknowledged, in which her husband joins.(a)

And by 8 & 9 Vict. c. 106, s. 6, a contingent, an executory, and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, &c., also a right of entry, whether immediate or future, vested or contingent into or upon any such tenements or hereditaments may be disposed of by deed (save to defeat or enlarge an estate tail), and in the case of a married woman such deed must be in accordance with the 3 & 4 Will. 4, c. 74.

The 8 & 9 Vict. c. 106, s. 6, did not apply to the reversionary interest of a married woman in personalty.(b) By 20 & 21 Vict. c. 57, ss. 1 and 2, however, she is empowered by deed acknowledged, in which the husband concurs, to dispose of every future or reversionary interest, vested or contingent, in any personal estate which she or her husband in her right is entitled under any instrument *made* after 31 Dec. 1857, and also to release or extinguish any power vested in or reserved to her in regard to such personal estate; also to release or extinguish her right or equity to a settlement out of any personal estate to which she or her husband in her right may be entitled in possession under any such instrument. But this is not to extend to any reversionary interest she is restrained from alienating by the instrument under which she takes.

As the Act says: "entitled under any *instrument*," &c., an expectant interest in the event of an intestacy is not within the Act.(c)

By sect. 4 the power of disposition given her is not to enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on her marriage. It will be noticed that sect. 1 requires the reversionary interest to be acquired under an instrument made after 1857; it has recently been held, however, by the Court of Appeal (Kay, L.J. dissenting) that if the reversionary interest be money invested on mortgage of realty, it then becomes an "interest in land" within sect. 1 of 3 & 4 Will 4, c. 74, and may be passed by deed acknowledged under sect 77 of that Act, although the interest was taken under an instrument executed before 31 Dec., 1857.(d)

The 8 & 9 Vict. c. 106, s. 7, enables a married woman, by deed

(a) *Dart's V. & P.* 9, 6th edit.; *Carter v. Carter*, 65 L. J. 86, Ch.; (1896) 1 Ch. 62; 73 L. T. Rep. N. S. 437.

(b) *Seaton v. Seaton*, 13 App. Cas. 61; 57 L. J. 661, Ch.; 58 L. T. Rep. N. S. 565; 36 W. R. 865.

(c) *Allcard v. Walker*, 74 L. T. Rep. N. S. 487; (1896) 2 Ch. 369; 65 L. T. 660 Ch.; 44 W. R. 661.

(d) *Miller v. Collins*, 74 L. T. Rep. N. S. 122; 65 L. J. 353, Ch.; 44 W. R. 466; (1896) 1 Ch. 578.

acknowledged, in which her husband joins, &c., to disclaim any estate or interest in any tenements or hereditaments of any tenure.

In all the foregoing cases, if the marriage be solemnized since the operation of the Married Women's Property Act, 1882, the provisions of that Act would apply to the effect already stated.

As to a married woman's legal terms for years in possession, not coming within sect. 7 of 33 & 34 Vict. c. 93, or 45 & 46 Vict. c. 75 (Married Women's Property Acts, 1870 and 1882), or not being settled to her separate use, the husband may, without her concurrence, dispose of them by act *inter vivos*, but not by his will, and if he does not do so and she survive him they belong to her; and if he survive they become his property *jure mariti* without any letters of administration being taken out by him.(a) But in order that her reversionary terms for years may pass by his assignment they must have been capable of vesting in possession during coverture.(b)

And as to her equitable terms for years (not being her separate estate, or property within the above statutes), it is necessary that she should join in the assignment, and acknowledge the deed, so as to bar her equity to a settlement.(c)

A married woman may make or consent to any application under the Settled Estates Act, 1877; but before doing so she must, whether the property be settled upon trust for her separate use or not, be separately examined as to her free consent to the application (sect. 50), if she was married before 1883(d); but not if married since this date(e); nor if the property comes to her since this date though married before.(f)

By 45 & 46 Vict. c. 75, s. 18, a married woman who is an executrix, or administratrix, alone or jointly with any other person, or a trustee alone or jointly as aforesaid, may transfer or join in transferring any such annuity or deposit, as is specified in the Act (sect. 9), or any sum forming part of the public stocks or funds, or of any other stocks or funds, transferable as is specified in the Act, or any share, stock, debenture, or other benefit, right, claim, or other interest of or in any such corporation, company, &c., in that character, without her husband, as if she were a *feme sole*.

It will be noticed that no mention is made in the section of real estate or any interest therein. And sects. 1 and 2 of the Act only enable her to dispose of her separate property as if she were a *feme sole*, &c.

It has accordingly been held that a married woman, though married after the operation of the Act, cannot convey real estate vested in her

(a) *Re Bellamy. Elder v. Pearson*, 25 Ch. Div. 620; 53 L. J. 174, Ch.; 49 L. T. Rep. N. S. 708; *Surman v. Wharton*, (1891) 1 Q. B. 491; 60 L. J. 233, Q. B.; 64 L. T. Rep. N. S. 866; 39 W. R. 416.

(b) Dart's V. & P. 9, 6th edit.; *Re Bellamy*, sup.

(c) *Hanson v. Keating*, 4 Hare 1; Dart's V. & P. 10, 6th edit.

(d) *Re Arabin's Trust*, 52 L. T. Rep. N. S. 728.

(e) *Riddell v. Errington*, 26 Ch. Div. 220; 50 L. T. Rep. N. S. 584; 32 W. R. 680.

(f) *Re Harris*, 28 Ch. Div. 171; 54 L. J. 208, Ch.; 33 W. R. 393; *Re Batt's Settled Estates*; (1897) 2 Ch. 65; 66 L. J. 635, Ch.

jointly with other persons upon trust for sale, without the concurrence of her husband and the deed being acknowledged by her.(a)

But a married woman to whom since the Act real estate is conveyed by way of mortgage to secure money belonging to her as her separate property, not being a trustee of the property for the mortgagor, may join him in a conveyance thereof to a purchaser without the concurrence of her husband or the deed being acknowledged.(b)

It will be seen from the foregoing remarks that a married woman may, unless restrained from alienation, convey as a *feme sole* (1) property, real or personal, settled to her separate use (subject to the legal estate vested in any trustee); (2) property, real or personal, which is her separate property within the Married Women's Property Act, 1882; (3) freehold or copyhold hereditaments vested in her as a *bare* trustee; (4) property over which she has a general power of appointment; and (5) in those cases where she has acquired the status of a *feme sole* under the Divorce and Matrimonial Causes Acts.

In cases not within the above enumeration she must transfer, release, or disclaim her estate or interest by deed acknowledged, in which her husband must concur, unless his concurrence be dispensed with by the Court.(c) The requisites to the acknowledgment of a deed by a married woman will, however, be stated *post*, tit. "Purchases."

As to consents, &c., by a married woman under the Land Transfer Acts, see *post*, that title. And as to a married woman's power of granting leases of her property, see *post*, tit. "Leases."

Tenants for Life.

A tenant for life, save under a power of sale contained in the instrument creating his estate, or under some statutory power, can only dispose by sale of such life estate, or any less interest in the property. And if under a settlement of an estate he takes an estate for life with an ultimate remainder in fee, and he sells as owner of the fee to a person ignorant of the state of the title, he could not compel the purchaser to take his partial interest with a compensation. But the purchaser may at his option generally compel the tenant for life to convey to him such an interest as he has in the estate at a proportionate price.(d)

A grant by a tenant for life, not under same power, creates an estate *pur autre vie*, which will determine on the death of the tenant for life even if made to the grantee and his heirs. A tenant *pur autre vie*, or in dower, or by the curtesy, may also sell the estate of which he or she is possessed.(e)

(a) *Re Harkness and Allsop* (1896), 2 Ch. 358; 65 L. J. 726, Ch.; 74 L. T. Rep. N. S. 652.

(b) *Re Brooke and Fremlin's Contract*, 78 L. T. Rep. N. S. 416; 46 W. R. 442; 67 L. J. 272, Ch.; (1898) 1 Ch. 647.

(c) 3 & 4 Will. 4, c. 74; see hereon *Fowke v. Draycott*, 29 Ch. Div. 996, 54 L. J. 977, Ch.

(d) Sug. V. & P. 808, 14th edit.; *Mortlock v. Buller*, 10 Ves. 315; *Barnes v. Woods*, L. R. 8 Eq. 424; but see *Thomas v. Dering*, 1 Ke. 729; 6 L. J. 267, Ch.

(e) 5 Byth. & Jar. Conv. 26, 4th edit.

As to the statutory powers of a tenant for life in possession the Court (Chancery Division) may, by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), on his application, if it shall deem it proper, and subject to the provisions and restrictions in the Act, authorise a sale of the whole or any part of any settled estates, or of any timber, not being ornamental timber, growing thereon (sects. 16, 23). Minerals may be excepted from such sale (sect. 19). The application to the Court must be made with the consent of the persons mentioned in sect. 24, unless dispensed with under sects. 27 and 28; we shall, however, have occasion to again refer to the statute more fully subsequently.

This Act, though not repealed by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), is in effect rendered obsolete by its more comprehensive provisions. As will be shown more fully in the chapter on "Settlements," a tenant for life^(a) of settled lands may, under its provisions (as amended by subsequent Acts), without any application to the Court, (1) sell the settled land or any part thereof, or any right or privilege over it (except the principal mansion-house and the pleasure grounds and park and lands, if any, usually occupied therewith, unless with the consent of the trustees of the settlement, or an order of the court); and (2) may (with the like exception) exchange the settled land or any part of it for other land; and (3) may concur in making partition of the entirety of undivided shares of settled land, &c. The sale must be at the best price, and the exchange and partition at the best consideration in land, or land and money, that can reasonably be obtained. A sale may be by public auction or private contract, and reserve biddings may be fixed, and stipulations as to title, &c., made on a sale, exchange, or partition, &c.^(b) Due notice of the sale must be given to the trustees of the settlement^(c), as will be fully detailed subsequently.

The tenant for life has full power to complete such sale, &c.^(d)

The purchase money, &c., must, however, be dealt with as directed by the Act^(e) to be shown subsequently.

So his contract to sell, exchange, or make partition, &c., is binding and enures for the benefit of the settled land, and is enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself.^(f)

It has already (*ante*, p. 8) been stated that a tenant for life may convey under the Lands Clauses Consolidation Act, 1845.

(a) Certain other persons, to be specified subsequently, have the same powers over the settled land as the tenant for life (see sect. 58).

(b) 45 & 46 Vict. c. 38, ss. 3, 4; 53 & 54 Vict. c. 69, ss. 5, 10.

(c) 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.

(d) 45 & 46 Vict. c. 38, ss. 20, 55.

(e) 45 & 46 Vict. c. 38, ss. 21, 22.

(f) 45 & 46 Vict. c. 38, s. 31.

Tenants in Tail.

By the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), it is provided that a tenant in tail may dispose of for an estate in fee simple, or for any less estate, the lands entailed, so as to bind his issue, and the remainderman or reversioner expectant on such entail; but the disposition must be by deed, and enrolled in the central office of the High Court within six months after its execution. If there be a protector of the settlement, his consent is necessary to bar those in remainder; for an assurance under the Act without such consent only creates a base fee binding the issue, but not those in remainder, and the estate will end when the issue fails.(a)

And in case of a disposition of lands, &c., under the Act by a tenant in tail, &c., the jurisdiction of equity is to be altogether excluded in regard to specific performance of contracts, &c.(b)

However, it has been held by the Court of Appeal that sect. 47 of 3 & 4 Will. 4, c. 74, does not interfere with the jurisdiction of the court to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the court from treating the contract as being in equity a disposition taking effect under the Act, so as to bind the issue or remainderman.(c)

And by 45 & 46 Vict. c. 38, s. 58, a tenant in tail in possession, including one who is by statute restrained from barring his estate tail, and although the reversion is in the Crown, not being a tenant in tail of land in respect whereof he is so restrained which was purchased with money provided by Parliament in consideration of public services, has the powers of a tenant for life under the Act. As has also a tenant in tail after possibility of issue extinct.

It has already (*ante*, p. 8) been shown that a tenant in tail may convey lands under the Land Clauses Consolidation Act, 1845.

Traitors and Felons.

Attainted persons, though they might purchase lands, were disabled from holding them, the lands so purchased being subject to escheat and forfeiture. They were also incapable of conveying so as to effect the Crown or the lord of the fee, and that, from the time of the offence committed, for such conveyance might tend to defeat the right of the Crown or of the lord.(d) By the 33 & 34 Vict. c. 23, however, it is enacted that no conviction for treason or felony shall any longer cause attainder, forfeiture, or escheat; but this Act is not to affect forfeiture consequent upon outlawry (sect. 1). By sect. 8, however, such convicts(e) are prevented from alienating during the period of their sentence. By

(a) 3 & 4 Will. 4, c. 74, ss. 15, 22, 32, 34, 36, 40, &c.

(b) s. 47.

(c) *Banks v. Small*, 36 Ch. Div. 716; 56 L. J. 832, Ch.; 57 L. T. Rep. N. S. 292; 35 W. R. 765, C. A.

(d) 2 Bl. Com. 290; Co. Lit. 42, b.

(e) "Convict" means any person against whom sentence of death or penal servitude has been pronounced for treason or felony (sect. 6).

sect. 30, however, property acquired by a convict "during the time he shall be lawfully at large under any licence," is exempted from the disabilities of sect. 8. So by sect. 7, when he becomes bankrupt, or has suffered his punishment, or has received a pardon, he is to cease to be subject to the operation of the Act. By sect. 9 the Crown may appoint an administrator of the convict's property, in whom it vests on his appointment (sect. 10); and he has power to let, mortgage, sell, convey and transfer such property (sect. 12). Subject as above, the convict's property is to revert to him, on his ceasing to be subject to the operation of the Act, or to his representatives, real, or personal (sect. 18). By 42 & 43 Vict. c. 59, s. 3, outlawry in a civil action is abolished.

Trustees and Executors.

A trustee for sale is not allowed to purchase the trust property even at an adequate price, for he cannot buy from himself. Nor can a trustee whose duty it is to purchase particular property for his *cestui que trust*, buy for himself. And a trustee for sale is not allowed to buy the trust property, even at a sale by public auction. But the rule does not apply to mere dry trustees, as a trustee to bar dower, or of a mere outstanding legal estate. And a trustee may purchase from his former *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a scrupulous and jealous examination of all the circumstances, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee.(a)

The same restriction on the right of purchase applies to other persons standing in similar confidential situations, as to counsel, agents, trustees, and solicitors of a bankrupt's or insolvent's estate, auctioneers and creditors who have been consulted as to the sale. This is prohibited in order to prevent the temptation of such persons availing themselves of information for their own benefit and concealing it from those for whom they act.(b)

If two persons, not partners in trade, purchase lands and advance the money in equal portions and take a conveyance simply to themselves in fee, they will hold the estate as joint tenants, and the survivor will take the whole. It is otherwise, however, where the money is advanced in unequal proportions, for then the survivor will be held to be a trustee for the deceased's representatives to the amount advanced.(c)

If real estate is purchased out of money belonging to a firm, or has otherwise become partnership property, it will, unless the contrary appears, be treated as between the partners and the representatives of a deceased partner, &c., as personal and not as real estate (53 & 54 Vict. c. 39, ss. 20, 21, 22). And where co-owners of land, not being

(a) *Fox v. Mackreth*, 1 L. C. Eq. 141, 175, 6th edit.; Story's Eq., sects. 321, 322; *Ex parte Lacy*, 6 Ves. 625; Dart's V. & P. 38, 48, 6th edit.

(b) Story's Eq., sect. 322; Dart's V. & P. 39, 6th edit.

(c) *Lake v. Gibson*; *Lake v. Craddock*, 1 L. C. Eq. 215, 217, 6th edit.; Story, Eq. sect. 1206.

itself partnership property, are partners as to the profits made by the use of it, and purchase other land out of the profits to be used in like manner, they are, in the absence of a contrary agreement, not partners but co-owners thereof for the same respective estates and interests as they have in the original land (sect. 20, sub-sect. 3).

The powers of sale of realty by trustees and executors must now in case of wills be considered in connection with Part I. of the Land Transfer Act, 1897. Irrespective of that Act, trustees may sell under an express or implied power of sale contained in or arising under some instrument, or under the provisions of some statute. The Statute 22 & 28 Vict. c. 35, enacts that where a testator has charged his real estate, or any portion thereof, with the payment of his debts, or legacies, &c., and has devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein^(a), and has not made express provision for raising such debts or legacies, &c., out of such estate, it is lawful for the trustee or trustees, notwithstanding any trusts actually declared by the testator, to raise such debts, or legacies, &c., by sale by public auction or private contract of the property or any part thereof, or by mortgage thereof, or partly in one mode, and partly in the other (sect. 14).

By sect. 15, the above powers may be exercised by any one in whom the estate is vested by survivorship, descent, or devise, or by any person appointed under any power in the will, or by the Chancery Division of the High Court, to succeed to the trusteeship.

By sect. 16, if the whole estate and interest of the testator be not devised to a trustee or trustees, then the executors of the will have the powers conferred by the 14th sect. And under the 56 & 57 Vict. c. 53, s. 13 (repealing and re-enacting 44 & 45 Vict. c. 41, s. 35), where a trust for sale or a power of sale of property is vested in trustees they may, if a contrary intention is not expressed in the instrument, sell or concur in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions of sale as the trustees think fit, with power to vary or rescind any contract for sale, and to buy in and resell, without being answerable for any loss (sub-sects. 1, 2).

The section only applies to instruments operating after 31st Dec. 1881 (sub-sect. 3).

And prior to the Stat. 22 & 23 Vict. c. 35, it was held that where a testator charged his real estate with the payment of his debts generally and devised such estate to the trustees of his will, they had an implied power to sell such real estate and give a valid receipt for the purchase money.^(b) The same law applies to executors.^(c) But it seems that,

^(a) *Re Adams & Perry* (1899), 1 Ch. 554; 80 L. T. Rep. N. S. 149; 68 L. J. 259, Ch.; 47 W. R. 236.

^(b) *Elliott v. Merriman*, 1 L. C. Eq. 70, 6th, edit.; 2 *Id.* 896, 7th edit.

^(c) *Robinson v. Lowater*, 5 De G. M. & G. 272; *Cook v. Dawson*, 29 Beav. 123; 4 L. T. Rep. N. S. 226; Dart's V. & P. 693, 6th edit.

independently of the above Act, executors selling under such an implied power could not pass the legal estate.(a) And by sect. 16, of 22 & 23 Vict. c. 35, a sale under the Act is to operate only on the estate and interest whether legal or equitable of the testator, and is not to render it unnecessary to get in any outstanding legal estate (sect. 16). This would seem to enable them to pass both the legal and equitable estate.

Where a will gives a power to sell real estate without mentioning a person to sell, and the proceeds thereof are to be distributed by the executor in the payment of debts and legacies, the power to sell will vest in the executor.(b) Where executors have the legal fee and sell real estate charged with debts, a purchaser is not bound to inquire whether debts remain unpaid unless 20 years have elapsed from the testator's death(c); for after that period, which bars even a specialty debt, it is presumed there are no debts remaining unpaid, and a sale therefore is unnecessary.

It has been held that an administrator with the will annexed has no power to sell real estate under 22 & 23 Vict. c. 35, s. 16.(d)

By 44 & 45 Vict. c. 41, s. 30, trust and mortgage estates of inheritance or limited to the heir as special occupant vested in any person solely, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives like a chattel real, with power for one or all such personal representatives to deal with the same.

By the Copyhold Act, 1894 (57 & 58 Vict. c. 46), the above sect. is not to apply to copyhold or customary lands vested in the tenant on the Court Rolls on trust or by way of mortgage (sect. 88). This sect. replaces sect. 45 of the Copyhold Act of 1887, to the same effect, and on the latter sect. it was held that its effect was to repeal sect. 30 of the Conveyancing Act of 1881 as to copyholds, so that if a sole trustee had died between the commencement of the latter Act and the passing of the Copyhold Act of 1887, the legal estate in the copyholds, which, by virtue of sect. 30, had on his death devolved upon his personal representatives, was, on the passing of the Copyhold Act of 1887, divested from them and vested in his customary heir or devisee. But that any disposition of the property made by the personal representatives before the passing of the Copyhold Act would be valid.(e)

Where a testator charges his real estate with his debts generally and devises it to a devisee for his own benefit, then, although the property may be also charged by the will with legacies, the devisee, if an executor also, can confer a good title upon the purchaser without the concurrence of the legatees, for the trust or power created by the general charge of debts

(a) See 5 Byth. & Jarm. Conv. 35, 4th edit; *Gosling v. Carter*, 1 Coll. 644.

(b) *Forbes v. Peacock*, 11 M. & W. 630; 12 L. J. 460, Ex.; Sug. Pow. 118, 8th edit.

(c) *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465; 51 L. J. 434, Ch.; 46 L. T. Rep. N. S. 542; 30 W. R. 801.

(d) *Re Clay and Tetley*, 16 Ch. Div. 3; 43 L. T. Rep. N. S. 402; 50 L. J. 164, Ch.

(e) *Re Mills*, 37 Ch. Div. 312; 40 *id.*, 14; 60 L. T. Rep. N. S. 444; 37 W. R. 81

must override and be paramount to every beneficial gift or charge.(a) But where real estate is devised in fee to a devisee beneficially, charged with a scheduled debt or particular legacy, the devisee, even if one of the executors, cannot give a good discharge to a purchaser of such estate without the concurrence of the legatee.(b)

A trustee, or other person, having a power of sale, &c., of land, may, having obtained the sanction of the High Court, dispose of the land, with an express exception or reservation of the minerals, with or without power of working them, &c., and may, unless forbidden by the trust instrument, again do so without any leave (56 & 57 Vict. c. 53, s. 44; 57 & 58 Vict. c. 10, s. 3). This right was first given by 25 & 26 Vict. c. 108, s. 2, now repealed.

As will be shown more fully subsequently, power is given by several statutes(c) to trustees to give receipts in writing for any purchase money, &c., payable to them under any trust or power, which effectually discharges a purchaser from liability to see to the application thereof.

Where trustees are selling under an express power of sale contained in a settlement, it must be ascertained that the power has arisen; and if any consent is made necessary to the sale by the settlement, as that of the tenant for life, it must be shown that it has been given. And if he has incumbered his estate, or become bankrupt, the concurrence of the incumbrancer or trustee in bankruptcy, or of both, if both events have happened, is necessary.(d) If the consent is to be given by writing a parol consent will not suffice.(e) It is thought that the implied power given to executors to sell by a charge of debts on the realty (*ante*, p. 25) is not affected by the powers of sale given to tenants for life under the Settled Land Act, 1882.(f) And the Act expressly enacts that a power under a settlement or otherwise for the trustees to sell with the consent or by the direction of the tenant for life is not to be taken away or abridged by the Act, the powers given by the Act being cumulative. But if the provisions of the Act and of the settlement relative to any matter regarding which the tenant for life exercises a power under the Act conflict, the provisions of the Act are to prevail.(g) And by 47 & 48 Vict. c. 18, in case of a settlement within the meaning of sect. 63 of the Settled Land Act of 1882, any consent not

(a) *Corser v. Cartwright*, L. R., 7 H. L. Cas. 731; 45 L. J. 605, Ch.; 21 W. R. 938; Dart's V. & P. 678, 6th edit.

(b) *Re Rebbeck, Bennett v. Rebbeck*, 63 L. J. 596, Ch.; 71 L. T. Rep. N. S. 74.

(c) See 22 & 24 Vict. c. 35, sects. 17, 23; 45 & 46 Vict. c. 38, s. 40; 56 & 57 Vict. c. 53, s. 20.

(d) *Re Beddingfield and Herring's Contract* (1893) 2 Ch. 332; 62 L. J. 430, Ch.; 68 L. T. Rep. N. S. 634; 41 W. R. 413.

(e) *Phillips v. Edwards*, 33 Beav. 440.

(f) See Wolst. and B. Conv. 367, 7th edit.; 2 L. C. Eq. 919, 7th edit.

(g) Sect. 56; *Re Duke of Newcastle's Estate*, 24 Ch. Div. 129; 52 L. J. 645, Ch.; 48 L. T. Rep. N. S. 779; 31 W. R. 782.

required by the settlement is not by force of the Act of 1882 to be necessary to enable the trustees to sell.(a)

Trustees selling under a power of sale are bound to sell, so far as their judgment goes, to the best advantage for their *cestui que trust*; they should therefore ascertain the value of the property before a sale.(b)

As will be more fully shown hereafter, under 56 & 57 Vict. c. 53, s. 14, a sale by trustees cannot be impeached by a beneficiary because the conditions of sale were depreciatory.

Trustees for sale are bound to sell with all reasonable speed; but the court will not interfere with a *bond fide* exercise of their discretion in this respect.(c)

A power to sell in order to raise a sum of money implies, it is said, a power to mortgage, which is a conditional sale(d); but this is only the case when the purposes of the trust will be answered by a mortgage; for if it appears that a sale out and out was intended a mortgage is not a valid exercise of the power.(e)

It has been held that a trustee who has merely a power to mortgage *real* estate cannot grant a mortgage with a power of sale(f), for as he has no such power he cannot delegate it to another. But in another case it was held that trustees having power to mortgage might grant a mortgage with a power of sale, such a power being incident to a mortgage.(g) And under the Conveyancing Act, 1881, where the mortgage is by deed, the mortgagee has, unless a contrary intention is expressed therein, a statutory power of sale (sect. 19); which it is presumed will apply to mortgages under powers. A power to trustees to raise money by sale or mortgage authorises a mortgage with a power of sale.(h) An executor may mortgage the assets of his testator, including chattels real, and the mortgage deed may give the mortgagee a power of sale.(i)

If trustees contract to sell land as trustees for sale, at the time having no power to do so, as where the power of sale does not arise until the death of the tenant for life, they cannot compel the purchaser to enter into a new contract with the tenant for life, who is willing to sell under the powers of the Settled Land Act.(k) The distinction between a trust

(a) Sect. 6; *Taylor v. Poncia*, 25 Ch. Div. 646; 50 L. T. Rep. N. S. 20; 32 W. R. 335; *et post*, tit. "Settlements."

(b) *Ord v. Noel*, 5 Mad. 438; *Harper v. Hayes*, 2 Giff. 210; 8 W. R. 600.

(c) *Wilkinson v. Duncan*, 2 Jur. N. S. 530; 26 L. J. 495, Ch.; *Lewin on Trusts*, 485, 10th edit.

(d) *Mills v. Banks*, 3 P. Wms. 9; *Re Bellinger*, 79 L. T. Rep. N. S. 54; 67 L. J. 580 Ch.; (1898) 2 Ch. 534.

(e) *Stroughill v. Anstey*, 1 De. G. M. & G. 635; 22 L. J. 130, Ch.; *Sug. Pow.* 425, 8th edit.

(f) *Clarke v. Royal Panopticon*, 4 Dr. 26; 27 L. J. 207, Ch.; 5 W. R. 332.

(g) *Re Chowner's Will*, L. R. 8 Eq. 569; 38 L. J. 726, Ch.

(h) *Bridges v. Longman*, 24 Beav. 27.

(i) *Russell v. Plaice*, 18 Beav. 21; *Cruikshank v. Duffin*, L. R. 13 Eq. 555; 41 L. J. 317, Ch.; *Vane v. Rigden*, 5 Ch. App. 663; 37 L. J. 797, Ch.; *et post*.

(k) *Re Bryant and Barningham's Contract*, 44 Ch. Div. 218; 59 L. J. 636, Ch.; 62 L. T. Rep. N. S. 53; 38 W. R. 469.

and a power given to several persons, as to transmission thereof, will be treated of in a subsequent chapter.

As a rule fiduciary vendors must show a marketable title, and are liable to a purchaser as if they were absolute owners, save that they can only be required to enter into a covenant, express, or implied under sect. 7 of the Conveyancing Act, 1881, that they have done no act to incumber the property.(a)

Such is a brief statement of the law as to sales of realty by trustees and executors, so far as it remains unaffected by part 1 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65); for in cases of death after 31st December, 1897, the above Act establishes a real representative. Sect. 1 enacts that where real estate is vested in any person without a right in other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives as if it were a chattel real. And this is to apply to real estate over which a person has a general power of appointment which he exercises by will (sub-sects. 1, 2).

A general power of appointment is one that enables the donee thereof to appoint to whomsoever he pleases.(b)

But "real estate" is not to include copyholds or customary freeholds, where admission or any act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (sub-sect. 4).

Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate (sub-sect. 3).

The section applies only in cases of death after the 31st December, 1897 (sub-sect. 5, sect. 25).

It will be noticed that sect. 1 only applies when real estate is vested in a person without a right in any other person to take by survivorship. There is a right of survivorship between joint tenants, they being seized *per my et per tout*; but not between tenants in common who are seized of a distinct though undivided share.(c)

The personal representatives only hold the real estate as trustees for the persons beneficially entitled thereto, who have the same power of requiring a transfer thereof as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (sect. 2, sub-sect. 1).

The marginal note to sect. 1 is, "Devolution of legal interest in real estate on death." But it is conceived the words of the section itself are large enough to include equitable as well as legal interests in real estate. Therefore (*ex. gr.*), the equity of redemption in fee vested in a mortgagor who dies after 31st December, 1897, will, subject to the mortgage debt, vest in the first instance, in his personal representatives.

Sect. 1 of the Act does not apply to the Crown.(d)

(a) *Dart's V. & P.* 94, 146, 6th edit.; *Re Bryant and Barningham's Contract*, *sup.*

(b) *Sug. Pow.* 394, 8th edit.

(c) See 1 *St. Com.*, chap. viii., part 1; *Will. R. P.*, part 1, Ch. 6.

(d) *In bonis Hartley* (1899) P. 40; 68 L. J. 16, P.; 47 W. R. 287.

The Act further provides that all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real and the dealing therewith before probate or administration, &c., and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate are to apply to real estate, so far as the same are applicable, as if it were a chattel real vesting in them, save that it is not to be lawful for some or one only of several joint representatives, without the authority of the Court, to sell or transfer real estate (sect. 2, sub-sect. 2).

And in the administration of the assets of a person dying after the 31st December, 1897, his real estate is to be administered in the same manner, subject to the same liabilities for debt, costs, &c., as if it were personal estate, save that it is not to alter or affect the *order* in which real and personal assets respectively are now applicable towards payment of debts or legacies, or the liability of real estate to be charged with the payment of legacies (sub-sect. 3). And in granting letters of administration the Court is to have regard to the rights and interests of persons interested in the real estate (sub-sect. 4).

After the death of the owner of the land his personal representatives may (1) assent to any devise contained in his will, or (2) may convey the land to any person entitled thereto, as heir, devisee, or otherwise, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance subject to such a charge, all their liabilities in respect of the land are to cease, except as to acts done or contracts entered into by them before such assent or conveyance (sect. 3, sub-sect. 1).^(a)

After the expiration of one year from the death of the owner of the land, if his personal representatives have failed on the request of the person entitled to the land to convey it to him, the Court may on his application, and after notice to the personal representatives, order that the conveyance be made; or in the case of registered land, that he be registered as proprietor thereof, either solely or jointly with the personal representatives (sub-sect. 2).

The statute 3 & 4 Will. 4, c. 104 renders real estate, freehold or copyhold, assets liable to be administered in equity for payment of the deceased owner's debts, as well debts by simple contract as by specialty, as against the heir or devisee: but creditors by specialty in which the heirs were bound had priority over creditors by simple contract or by specialty in which the heirs were not bound. This preference was, however, taken away by 32 & 33 Vict. c. 46. And by 60 & 61 Vict. c. 65, real estate, not being copyhold, &c., requiring admission, &c., to complete the purchaser's title, will now be assets in the hands of the personal representatives of a deceased person in its due order for the payment of his debts, &c. And the rules of law affecting the dealings with chattels

(a) As to land registered under the Land Transfer Acts, see L. T. R., 1898, r. 130, stated *post*, tit. "Land Transfer Acts and Rules."

real before probate or administration, &c., and the powers, &c., of personal representatives in respect of the personal estate are to apply subject as already stated.

As the personal property of a deceased person vests, in the first instance, in his legal personal representatives for the payment of his debts, they can make a good title to any part of such property. An executor may assign chattels real, even against a specific legatee until such executor has assented to the bequest, and his receipt is a good discharge for the purchase money.^(a) And it has been held that the rule stated in *Re Tanqueray-Willaume* (*ante*, p. 26), where an executor is selling real estate, does not apply to the case of an executor selling leaseholds.^(b)

An executor may assign his deceased testator's leaseholds before probate, as he derives his power and title under the will and not from the probate; but an administrator is said to derive his title wholly from the letters of administration, and the deceased's personal estate vests in him from the grant, and consequently he cannot assign the deceased's leaseholds until he has obtained the grant.^(c) And even in the case of an executor, a purchaser is not bound to pay the purchase money to him until he obtains probate of the will, because until the evidence of title exists the executor cannot give a complete indemnity.^(d)

If the will does not peremptorily require an absolute sale the executor may raise the money required by a mortgage of the assets.^(e)

It has been held that leaseholds specifically bequeathed to a legatee pass to him by the mere *assent* of the executor without any deed of assignment by him.^(f) Therefore an assignee of leaseholds from an executor usually requires either the concurrence of the legatee therein, or a statement that the executor has not assented to the legacy.^(g)

An assignment of leaseholds by one of several executors who proves the will is good, executors having a joint and several interest in the testator's personal estate.^(h) But it has been held that one of several administrators could not do so⁽ⁱ⁾; however, it has since been decided otherwise.^(k) It will be noticed that by 60 & 61 Vict. c. 65, s. 2 (2), it is expressly enacted it shall not be lawful for some or one only of several joint

(a) Will, Exors. 570, 592, 595, 807, 1231, 9th edit.

(b) *Re Whistler*, 35 Ch. Div. 561; 57 L. T. Rep. N. S. 77; 56 L. J. 827, Ch.; 35 W. R. 662; *Re Venn and Furze's Contract* (1894), 2 Ch. 101; 63 L. J. 303, Ch.

(c) Will. Exors. 306, 309, 636, 8th edit.: 250, 551, 552, 9th edit.; Platt Leases, 367.

(d) *Newton v. Metropolitan Railway Company*, 1 Dr. & S. 583; 5 L. T. Rep. N. S. 542.

(e) Coote Mortg. 309, 5th edit.; *Berry v. Gibbons*, 8 Ch. App. 747; *Thorne v. Thorne* (1893) 3 Ch. 196; 63 L. J. 38, Ch.; 69 L. T. Rep. N. S. 378; *et supra*, p. 28.

(f) *Re Culverhouse, Cook v. Cook* (1896) 2 Ch. 251; 65 L. J. 484, Ch.; 74 L. T. Rep. N. S. 347; 45 W. R. 10.

(g) Dart's V. & P. 673, n. 6th edit.; but see Coote, Mortg., 309, 5th edit.

(h) *Simpson v. Gutteridge*, 1 Mad. 609; *Jacomb v. Harwood*, 2 Ves. 265; Will. Exors. 817, 820, 9th edit.

(i) *Hudson v. Hudson*, 1 Atk. 460. (k) *Jacomb v. Harwood*, *sup.*; Will. *sup.*

personal representatives, without the authority of the court to sell or transfer real estate.

As already shown by 44 & 45 Vict. c. 41, s. 30, freehold trust and mortgage estates vested in any person solely on his death devolve upon his personal representatives like a chattel real, with power for one or all such personal representatives to deal with the same.

The assent of an executor to a bequest is necessary, because the whole personal property of a testator devolves in the first instance upon the executor for payment of the deceased's debts; and the legatee has no authority to take possession of his legacy without such assent, which may be express or implied.(a) If a term of years or other chattel be bequeathed to one for life remainder over, the assent of the executor to the gift for life enures for the benefit of the remainder also.(b)

It seems from the provisions of sect. 1 (1), sect. 2, and sect 3 (1), of 60 & 61 Vict. c. 65, that the assent of the personal representative to any devise contained in the will is now necessary, as if it were a bequest; or a conveyance by him of the land to the person entitled, which would be necessary in case of an intestacy. For the purpose of registration of a title under the Land Transfer Acts and Rules, a form of assent to a devise is given in the forms (No. 46) to the Rules, and the practice thereon is prescribed by rule 130.(c)

Under sect. 1 (3) of 60 & 61 Vict. c. 65, it will be seen that, although real estate is to be administered in the same manner, &c., as personal estate, the order in which real and personal estate respectively are to be applied towards payment of debts, &c., is not to be affected. It is sufficient here to state that the personal estate of the deceased constitutes the primary and natural fund for the payment of his debts(d), so that as a rule the personal representatives will not be entitled to deal with the realty for this purpose until the personal estate is exhausted. The personal estate may, however, be exonerated from its primary liability either (1) by express words, or a plain intention of the testator; as, to illustrate the latter, where the testator directs his real estate to be sold for the payment of his debts, and expressly bequeathes his personal estate to legatees.(e) So (2) the personal estate is exonerated where the debt or charge is in its own nature real, as in the case of a jointure rent charge(f); and (3) as we shall show fully subsequently where the debt is a mortgage debt created by the deceased who dies after the operation of 17 & 18 Vict. c. 113 and amendment Acts, without having signified any contrary intention, in which case the heir or devisee of the mortgaged lands takes them subject to the debt, and cannot require the debt

(a) Will. Exors., 600, 1225, *et seq.*, 9th edit.

(b) Will. 1229, *sup.*; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

(c) See *post* tit. "Land Transfer Acts and Rules."

(d) *Ancaster v. Mayor*, 1 L. C. Eq. 1, *et seq.*, 7th edit.

(e) Story's Eq. ss. 571, 572; *Re Stokes*; *Parsons v. Millar*, 67 L. T. Rep. N. S. 223; *Re Salt*; *Brothwood v. Keeling* (1895), 2 Ch. 208; 64 L. J. 494, Ch.; 43 W. R. 500.

(f) Story's Eq. ss. 574, 575.

to be paid out of any other estate of the deceased. And before those statutes, if the mortgage debt had been created, not by the person who died last seized, or entitled to the estate, but by some other person from whom he took it by descent or devise, or from whom the ancestor purchased it, the personal estate was exonerated from paying the debt.(a) Nor by 30 & 31 Vict. c. 69, s. 2, and 40 & 41 Vict. c. 34, can the heir at law or devisee or legatee of land contracted to be bought by a deceased person require the executor or administrator to pay the purchase money for such land out of any other estate of the deceased unless he has signified a contrary intention.

As to the liabilities of executors and administrators, they may, under 16 & 17 Vict. c. 51, become personally accountable to the Crown for succession duty to the extent of the property or funds actually received or disposed of by them respectively (sects. 1, 44).(b) However, as to the liability of an executor or administrator for estate duty payable on real estate, he seems to be protected by s. 6 (2), and s. 8 (4), of the Finance Act of 1894 (57 & 58 Vict. c. 30), and s. 5 of the Land Transfer Act of 1897. Sect. 6 of the Finance Act enacts that the executor shall pay the estate duty in respect of all personal property, wherever situate, of which the deceased was competent to dispose at his death, and *may* pay such duty on any other property passing on such death, which by any testamentary disposition of the deceased is under the control of the executor, or if not so under his control, then at the request of the person accountable for duty (sub-sect. 2); and having done so, is by sect. 9 (4), entitled to be reimbursed by the trustees or owners of the property.

By sect. 8 (4) where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect thereof, every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received and disposed of by him, every trustee or other person in whom any interest in the property so passing, or the management thereof is at any time vested, &c., is to be accountable for the estate duty on the property, and must deliver and verify an account of the property.

By sect. 9 (1) a rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such is to be a first charge on the property liable, save as against a *bonâ fide* purchaser thereof for value without notice.

The property passing to an executor as such, was, prior to the Land Transfer Act, 1897, all the deceased's personal property, including chattels real, as a term of years, however long.(c) By the above Act, however, freehold estate is also, under the circumstances and conditions already detailed, to vest in him.

By sect. 5 of the Act, nothing in part 1 is to effect any duty payable in

(a) Story's Eq., s. 576.

(b) See *Re Higgin's*, 31 Ch. Div., 142.

(c) Will. Exors. 557, 592, 9th edit.

respect of real estate, or impose on real estate any other duty than is now payable in respect thereof.

By the Land Transfer Act of 1875, s. 68, a trustee with a power of sale of land may authorise the purchaser to make an application to be registered as first proprietor under the Act. (See fully *post*, tit. "Land Transfer Acts and Rules.")

Mortgagees.

The power of a mortgagee to sell the mortgaged property, will be treated of *post*, tit. "Mortgages."

Solicitor and Client.

The court does not hold that a solicitor is wholly incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the solicitor the *onus* of proving by evidence that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser.(a) A solicitor cannot buy from his client the subject-matter of the action which he is conducting. But it lies only with the client and his representatives to object to the validity of the purchase.(b) And the client is entitled to a retransfer from the solicitor or from a purchaser, with notice of the impropriety of the purchase by the solicitor.(c) The relation of solicitor and client, *subsequent* to the assignment of the fruits of a verdict in an action is not sufficient to avoid the bargain.(d)

And, as a rule, a solicitor is not allowed to accept a gift, *inter vivos*, from his client; and the *onus* of proving the fairness of the transaction lies on the solicitor. It must, in fact, be shown by the solicitor that the donor had previous competent and independent advice, or that after the confidential relationship ceased something was done amounting to a release of the client's right to set aside the gift.(e) But if there be no improper inducement for a gift by will, the considerations applicable to gifts *inter vivos*, from a client to his solicitor are not applicable to testamentary gifts.(f)

Bankrupts and their Trustees.

By the Bankruptcy Act, 1883, when a receiving order in bankruptcy is made by the Court, an official receiver of the bankrupt's property is thereby constituted, but after an adjudication in bankruptcy made and a

(a) *Pisani v. Attorney-General for Gibraltar*, L. R. 5 P. C. 516.

(b) *Davis v. Freethy*, 59 L. J. 318, Q. B.; 24 Q. B. Div. 519, C. A.; *Nutt v. Easton* (1899), 1 Ch. 873; 80 L. T. Rep. N. S. 353; 68 L. J. 367, Ch.

(c) Cord. Solr. 99, 103.

(d) *Davis v. Freethy*, sup.

(e) *Morgan v. Minett*, 6 Ch. Div. 639; 36 L. T. Rep. N. S. 948; *Tyars v. Allsop*, 59 L. T. Rep. N. S. 367; 61 Id. 8; 37 W. R. 339, C. A.; *Liles v. Terry*, 73 L. T. Rep. N. S. 428; 65 L. J. 34, Q. B.; 44 W. R. 116; (1895)2 Q. B. 679.

(f) *Hindson v. Weatherill*, 5 De G. M. & G. 301.

trustee appointed, the bankrupt's property (save trust estates) vested in him at the commencement of the bankruptcy, or acquired by him before his discharge, and the capacity to exercise such powers over property as might have been exercised by the bankrupt for his own benefit (except the right of nomination to a vacant ecclesiastical benefice), including certain goods in his order and disposition, become vested in the trustee without any conveyance or assignment whatever. And the title of the trustee to the property is to be deemed to have relation back to, and to commence at, the time of the Act of Bankruptcy being committed on which the receiving order is made.(a)

However, subject to the above, and to the avoidance of voluntary settlements(b) and fraudulent preferences, the Act does not invalidate any payment to the bankrupt, or any conveyance, assignment, or contract, &c., by the bankrupt for value, if such payment, &c., takes place before the date of the receiving order, and the person dealing with the bankrupt has not at the time of the payment, &c., notice of an available act of bankruptcy committed by the bankrupt before that time(c); even if the transaction itself amounts to an act of bankruptcy.(d) But although a contract of sale to be completed on a certain date, entered into without notice of an available act of bankruptcy by the vendor, is a protected transaction under sect. 49 of the Act, yet such protection does not extend to a conveyance or payment made in pursuance of such contract with notice of an available act of bankruptcy committed after the contract has been entered into and before the day fixed for completion. And the purchaser may refuse to complete and recover back a deposit paid on entering into the contract, because the vendor is not in a position at the latter date to give either a good conveyance or a valid receipt for the purchase money.(e)

And if a bankrupt before his discharge enters into transactions in respect of property acquired after the bankruptcy, then until the trustee in bankruptcy intervenes, all such transactions with any person dealing with the bankrupt *bonâ fide* and for value, with or without notice of the bankruptcy are valid.(f) The bankrupt under the above detailed circumstances can make a good title to leaseholds for years,(g) but not to real estate.(h)

(a) 46 & 47 Vict. c. 52, ss. 5, 9, 21, 43, 44, 54.

(b) See *post*, tit. "Voluntary Settlements."

(c) 46 & 47 Vict. c. 52, s. 49.

(d) *Shears v. Goddard* (1896) 1 Q. B. 406; 65 L. J. 344, Q. B.; 74 L. T. Rep. N. S. 128; 44 W. R. 402, C. A.

(e) *Powell v. Marshall*, 68 L. J. 477, Q. B.; (1899) 1 Q. B. 710; 80 L. T. Rep. N. S. 509, C. A.

(f) *Cohen v. Mitchell*, 25 Q. B. Div. 262; 59 L. J. 409, Q. B.; 63 L. T. Rep. N. S. 206, C. A.; *Hunt v. Fripp*, 67 L. J. 377, Ch.; 77 L. T. Rep. N. S. 516; 46 W. R. 125; (1898) 1 Ch. 675.

(g) *Re Clayton and Barclay's Contract* (1895) 2 Ch. 212; 72 L. T. Rep. N. S. 764; 64 L. J. 615, Ch.

(h) *New Land Development Company and Gray or Fagance* (1892) 2 Ch. 138; 66 L. T. Rep. N. S. 694; 61 L. J. 495, Ch.

The trustee in bankruptcy is by 46 & 47 Vict. c. 52, s. 50, to take possession of the deeds, &c., of the bankrupt. And where any property of the bankrupt is of copyhold or customary tenure, the trustee is not to be compellable to be admitted thereto, but may deal with it in the same manner as if it had been surrendered to such uses as he may appoint, and the appointee is to be admitted accordingly.

The bankrupt's things in action are by the same section to be deemed to have been duly assigned to the trustee.

And by sect. 56 the trustee may, subject to the provisions of the Act, sell all or any part of the bankrupt's property by public auction or private contract, transfer it and give valid receipts for money; also deal with any property of which the bankrupt is tenant in tail in the same manner as the bankrupt might have dealt with it, and sects. 56 to 73 of 3 & 4 Will. 4, c. 74 (Fines and Recoveries Act, are to apply.

And as already stated, sects. 44 (ii) and 56 (4) of 46 & 47 Vict. c. 52, enable the trustee to exercise all powers in or over property which might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice.

Aliens.

Formerly an *alien* could not, even though the subject of a friendly state, hold real estate here unless under a mere lease taken for the residence or occupation of himself or his servants, or for the purpose of trade or business, for a term not exceeding twenty-one years. The conveyance to an alien of any greater estate in lands was a cause of forfeiture to the Crown, who after office found might have seized the lands.(a) By the Naturalisation Act, 1870, 33 Vict. c. 14, however, it is provided that real and personal property of every description (except a British ship) may be acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner as through, from, or in succession to a natural-born British subject.(b)

Conditions in Restraint of Alienation.

A condition in absolute restraint of alienation annexed to a gift in fee simple, even though its operation is limited to a particular time, as during the life of another living person, is void in law, as being repugnant to the nature of an estate in fee simple.(c)

However, an estate may within certain limits be given or granted to a

(a) Will. Real. Pro. 65, 13th edit.; Broom's Const. Law, 4, note (q).

(b) 33 Vict. c. 14, ss. 2, 14.

(c) *Re Rosher*; *Rosher v. Rosher*, 26 Ch. Div. 801; 53 L. J. 722, Ch.; 51 L. T. Rep. N. S. 785; 32 W. R. 820.

person, and may be made to determine or go over on the occasion of an event, which in case he were absolute owner, would operate as a voluntary or involuntary alienation, as on the bankruptcy of the alienee (*a*), as will be fully shown *post*, under the head of "Settlements."

Another exception occurs in the case of a married woman, who is allowed to have property settled upon her in such a way that she cannot, while married, make any disposition of it, as already shown. (*b*)

(*a*) Dart's V. & P. 20, 6th edit.

(*b*) See *ante*, p. 16, *et post* tit. "Settlement."

CHAPTER II.

SALES.

General Remarks.

SALES of real estates are made either by public auction or by private treaty.

On a sale by public auction, the property which is the subject of the sale is usually described in a printed statement called *particulars of sale*, and this is accompanied by another statement specifying the terms subject to which the sale is made, termed *conditions of sale*.

On a sale by private treaty the only difference is that the contract or agreement of sale takes the place of the conditions of sale, and of course no auctioneer is required.

Before a solicitor, acting on behalf of a vendor, is in a position to prepare the particulars of sale and the conditions or contract of sale, he must investigate the title to the property which is to be the subject of the sale. For this purpose he must carefully peruse the title deeds and documents relating to the property it is proposed to sell. If, on such perusal and investigation, he finds defects, whether in the capacity of the proposed vendor to sell or otherwise, he must ascertain whether they are such as can be remedied or not. If a defect in the title turns out to be irremediable, the solicitor must then consider whether it is advisable to offer the property for sale subject to the defect or incumbrance, or to abandon the contemplated sale: for to place property on the market with a defective title might be affording information to, and putting parties on the alert, who, hitherto ignorant of any real or supposed rights they may have in the property, might now involve the estate in litigation and expense.

And when a title is sound it is necessary, notwithstanding recent legislation in favour of vendors, that a solicitor should protect his client from unnecessary requisitions and cost in the deduction of such title. For it sometimes happens that the deeds abstracted are lost, or the vendor may be unable to compel their production, or that some of the deeds are unstamped or unregistered. And other points may arise on the title which would entail heavy outlay and cost on the vendor to clear up in proportion to the amount of the purchase money; or he may even lose the whole of the purchase money thereby; yet a purchaser,

in the absence of proper stipulation to the contrary would have a right to insist on the title, extending back for forty years, being made good, and the purchase completed.(a)

A recent case fully illustrates the foregoing remarks: A vendor was selling as mortgagee. Amongst the conditions was the usual one, that if the vendor was unable or unwilling to answer any requisition, or remove any objection raised by a purchaser as to the title he was to be at liberty to rescind the contract of sale. After the abstract of title was delivered the purchaser discovered, what had not been discovered by the vendor, that the property was subject to a prior mortgage, and the vendor being unable or unwilling to answer the requisition made by the purchaser, that he should pay off the first mortgage, claimed to rescind the contract of sale. However, it was held that the vendor had no right to rescind the contract. The abstract of title did not disclose the fact which the purchaser afterwards discovered of there being a prior mortgage, which was a very serious objection to the title, and the vendor's ignorance thereof did not exonerate him from complying with the requisition because the charge would have to be paid out of the purchase-money. There is no hardship the court said upon the vendor, and the contract must be completed, and the costs paid by the vendor.(b)

The estate or interest the vendor has in the property, and his power of disposition over it must also be ascertained. If it is found that he takes only a joint or limited interest in the property,(c) it should be considered whether such interest would not sell more advantageously if the concurrence of other parties interested in the property could be obtained. As if an intending vendor be a joint tenant, or tenant in common, or a tenant for life merely.

If the estate it is proposed to sell is found to be incumbered, it must be ascertained if the incumbrances are matters of conveyance only, which the vendor has the power to clear off, as a mortgage; or are matters of title, which he cannot compel the incumbrancer to release, as a jointure rentcharge. In the latter case, if the jointress will not voluntarily release her jointure, the estate must be sold subject to the incumbrance.(d)

A purchaser may by private arrangement be content to accept a defective title with an indemnity, yet it is clear that neither vendor or purchaser have a right to insist upon a contract being completed upon such terms in the absence of agreement.(e)

Particulars of Sale.

If there be any doubt as to the extent and value of the property, it should be surveyed and valued by a competent surveyor and valuer.

If the sale is to be by public auction the solicitor should first engage

(a) See 1 Prid. Conv. 23, *et seq.*; 1 Dart's V. & P. 109, *et seq.*, 6th edit.

(b) *Re Jackson and Oakshott*, 14 Ch. Div. 851; 49 L. J. 523, Ch.; 28 W. R. 794.

(c) As to the powers of limited owners over settled land, see *post*.

(d) Dart's V. & P. 321-324, 6th edit.; Sug. V. & P. 350, 14th edit.

(e) Dart's V. & P. 1194, 6th edit.; Fry, Sp. Perf. 522, 540, 2nd edit.

the services of a competent auctioneer, and give him instructions for the sale. In London and its neighbourhood the auctioneer will inspect the property, and obtain all necessary information for framing the particulars of sale, which, when done, he will forward to the solicitor to settle. In many country towns, however, the solicitor himself performs these duties.

Great care must be taken in framing the particulars of sale, for it is their office to give an accurate description of the property,^(a) and a substantial misdescription of the property, or a concealment of defects, would either (1) afford an unwilling purchaser good ground for rescinding the contract^(b); or (2) if the misdescription be as to quantity only, might entitle him to compensation, as shown *infra et post*; or (3) if the misrepresentation be fraudulent and damage is sustained thereby, the party damnified may bring an action of deceit, as shown *post*, p. 42.

And first as to what amounts to misrepresentation so as to entitle the purchaser to avoid the contract. The rule seems to be that where one person induces another to enter into an agreement with him by a material misrepresentation, it is no defence to an action to rescind the contract that the person to whom the misrepresentation was made had the means of discovering, and ought, with reasonable diligence, to have discovered that it was untrue. In order to take away the right to rescind a contract on the ground of misrepresentation, it must be shown, either that the person to whom the misrepresentation was made had knowledge of the facts which showed it to be untrue, or that he stated in terms, or showed clearly by his conduct that he did not rely upon the misrepresentation.^(c)

And a material misrepresentation, though innocently made, which induces another to enter into a contract under which he incurs obligations, furnishes a ground for avoiding the contract.^(d)

It must also be remembered that if a vendor employs an agent to sell property for him, that employment contains also an authority to describe the property truly, to represent its natural situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority, and if he induces a purchaser to enter into an agreement to purchase the property by making false representations not authorised by the vendor as to the value of the property, &c., this entitles a purchaser to be released from his contract.^(e) For a person is liable for the fraudulent

(a) *Torrance v. Bolton*, L. R. 14 Eq. 124; 8 Ch. App. 118.

(b) *Stanton v. Tattershall*, 1 Sm. & G. 529; *Torrance v. Bolton*, sup.; *Re Banister*, 12 Ch. Div. 131; 48 L. J. 837; Ch.; 40 L. T. Rep. N. S. 828; *Redgrave v. Hurd*, 20 Ch. Div. 1; 51 L. J. 113, Ch. 45 L. T. Rep. N. S. 485; Dart's V. & P. 106, 116, 6th edit.

(c) *Redgrave v. Hurd*, sup.

(d) *Reese Silver Mining Company v. Smith*, L. R. 4 H. L. Cas. 64; 39 L. J. 849, Ch.; 17 W. R. 1042; *Derry v. Peek*, 14 App. Cas. 337; 58 L. J. 864, Ch.; 61 L. T. Rep. N. S. 265; 38 W. R. 33; *Wauton v. Coppard*, (1899) 1 Ch. 92; 68 L. J. 8, Ch.; 79 L. T. Rep. N. S. 467; 47 W. R. 72.

(e) *Mullens v. Miller*, 22 Ch. Div. 194; 52 L. J. 380, Ch.; 31 W. R. 559.

misrepresentation of his agent, acting within the scope of his authority, and on his behalf.(a)

However, if there be no misrepresentation, and no effort made during the treaty to prevent a purchaser from seeing any defect which is *patent*, and might have been discovered, the contract will generally be binding on the purchaser.(b)

But if the defect be *latent*, which a purchaser could not discover by any attention whatever, the vendor is, it seems, bound to disclose it to him, even if the estate be sold expressly subject to all faults.(c) Thus any right upon the estate restrictive of the purchaser's enjoyment of it, and the release of which cannot be procured by the vendor, should be stated in the particulars, or the purchaser may avoid the contract; as a right of sporting over the estate, or a right of common, or a right to dig for mines, or any right or liability which cannot fairly admit of compensation.(d)

It seems, however, the vendor need not, if no inquiry is made, disclose a right of way over the estate where it is patent; yet if any such easement exists it should properly be stated in the particulars of sale.(e)

And a clause expressly stipulating that error in description of the estate shall not annul the sale will not protect a vendor against a misdescription made with full knowledge of the real facts.(f)

Generally speaking, however, in the absence of stipulation, misdescription in the particulars as to quantity is considered as a fit matter for compensation. And if the vendor cannot make a good title to the whole of the property, and the part to which a title cannot be made is not necessary to the enjoyment of the rest of the property, the contract will be enforced, and a proper abatement allowed to the purchaser out of the purchase money.(g) But this will not be done where the part to which no title can be made is material; as where a wharf and jetty were contracted to be sold, and no title could be made to the jetty.(h) We shall, however, have occasion, subsequently, to treat of the subject of compensation when discussing the usual conditions of sale.

(a) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; 15 W. R. 877; *Thorne v. Heard*, 73 L. T. Rep. N. S. 291; 64 L. J. 652, Ch.; 44 W. R. 155; (1895) A. C. 495; *Archer v. Stone*, 78 L. T. Rep. N. S. 34.

(b) *Dart's V. & P.*, 102, 110, 111, 152, 6th edit.; *Fry, Sp. Perf.*, 398 to 402, 3rd edit.

(c) *Dart's V. & P.* 102, 6th edit.; *Sug. V. & P.* 2, 333, 14th edit.; *Edwards v. Wickcar*, L. R. 1 Eq. 68; 18 L. T. Rep. N. S. 428.

(d) *Sug. V. & P.* 2, 311, 312, 14th edit.; *Dart's V. & P.* 102, 131, 520, 6th edit.; 1 *Prid. Conv.* 25, 17th edit.

(e) *Sug. V. & P.* 24, 320, 328, 14th edit.; *Dart's V. & P.* 131, 520, 6th edit.; *Heywood v. Mallalieu*, 25 Ch. Div. 357; 53 L. J. 492, Ch.

(f) *Norfolk (Duke of) v. Wortley*, 1 Camp. 337; *Flight v. Booth*, 1 Bing. (N. C.) 370, 377; *Heywood v. Mallalieu*, sup.

(g) *Fry, Sp. Perf.* 548, 554, 3rd edit.; *Re Fawcett and Holmes*, 42 Ch. Div. 150; 58 L. J. 763, Ch.; 61 L. T. Rep. N. S. 105, C. A.; *Burrow v. Scammell*, 19 Ch. Div. 176; 51 L. J. 296, Ch.; 45 L. T. Rep. N. S. 606; 30 W. R. 310.

(h) *Peers v. Lambert*, 7 Beav. 546; *Fry, Sp. Perf.* 550, 551, 3rd edit.

However, as before shown, if the vendor misrepresent the nature of the property the purchaser will not generally be relieved if he bought with full knowledge of its actual state.(a)

The same rules apply to incumbrances on the estate as to defects in the estate. The amount of the incumbrances should be set out accurately, and the nature of each charge clearly defined, so that a purchaser cannot be misled. For if any are omitted or misstated, and the incumbrance be one of title, the purchaser may rescind the contract, and cannot be compelled to take the estate, even with a compensation.(b) And the vendor or his solicitor who fraudulently conceals any instrument material to the title of the property sold, or any incumbrance, is guilty of a misdemeanor punishable by fine, or imprisonment for two years, with or without hard labour, or by both. The prosecution must, however, be with the consent of the Attorney or Solicitor-General.(c)

And, as already stated, where the misrepresentation is fraudulent, that is where the party making it knew it to be false, or asserted it recklessly, not caring whether it was true or false, and which induced the other party to enter into the contract, it will enable him to maintain an action of deceit to recover any damages he may have suffered thereby. It must be noticed that to sustain an action of deceit, actual fraud must be shown, which it is not necessary to show in order to maintain an action to rescind the contract.(d)

But a vendor may praise or puff his property, although contrary to truth. He may affirm the estate to be of any value he may choose to name; for it is deemed a purchaser's own folly to credit a bare assertion like this. Again, a vendor may, it seems, describe his land as rich water meadow land, although it is imperfectly watered. So he may state the fine payable for renewing a leasehold interest to be small, when it is really of considerable amount. Yet he must not assert contrary to the fact that the house is not damp.(e) And where a vendor asserted that a house offered for sale was occupied by a "most desirable tenant," and the purchaser entered into the contract in reliance thereon, and the statement proving false, the contract was rescinded; for such a statement will not be treated as *simplex commendatio* by the court.(f)

If a purchaser makes a mistake as to the property he bought from his own gross negligence, he cannot on that ground resist specific performance of the contract.(g)

(a) *Redgrave v. Hurd*, 20 Ch. Div. 1; 51 L. J. 113, Ch.; 45 L. T. Rep. N. S. 485, C. A.; Dart's V. & P. 111, 6th edit.

(b) Sug. V. & P. 5, 14th edit.; Dart's V. & P. 105, 1201, 6th edit.

(c) 22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8.

(d) *Derry v. Peek*, ante, p. 40; *Chandelor v. Lopus*, 2 Sm. L. C. 52, 10th edit.

(e) Dart's V. & P. 110, 6th edit.; Sug. V. & P. 2, 3, 330, 14th edit.

(f) *Smith v. Land, &c., Corporation*, 28 Ch. Div. 7; 51 L. T. Rep. N. S. 718, C. A.

(g) *Goddard v. Jeffreys*, 51 L. J. 67, Ch.; 45 L. T. Rep. N. S. 674; 30 W. R. 269.

Conditions of Sale.

The particulars of sale having been drawn and settled, the next step is to prepare the conditions of sale.

A vendor who offers property for sale by auction on the terms of printed conditions is liable to a member of the public who by bidding accepts the offer, if the conditions be violated, notwithstanding the Statute of Frauds.(a)

Since the operation of the Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881, 1882, contracts or conditions of sale need not contain stipulations as regards *title* and evidence of title except in special cases, as where the title is less than forty years, or where the deeds abstracted cannot be produced, &c. ; being rendered unnecessary by those statutes.(b)

The ordinary conditions of sale will now be to the following effect :

(1.) *Biddings*.—That the highest bidder be the purchaser, subject to the right of the vendor to bid by himself or his agent up to the reserved price ; and in case of dispute the property to be put up again at the last undisputed bidding.

By the 30 & 31 Vict. c. 48, the conditions of sale by auction of any land must state whether there is a reserved price or a right to bid, or whether it is sold without reserve. In the latter case it is illegal for the seller to employ any person to bid at the sale, or for the auctioneer to take knowingly a bidding from any such person. When the seller reserves a right to bid, he or any *one* person on his behalf may bid at the auction as he may think proper (sects. 4 to 6).

Both the facts that the sale is subject to a reserved bidding, and that a right to bid is reserved, must be stated in the conditions.(c)

(2.) *Deposit*.—As to payment of a deposit by the purchaser and signature of an agreement of purchase by him. This condition is intended as a guarantee for the performance of the contract and usually stipulates that the deposit shall be paid either into the hands of the auctioneer or the vendor's agent. If it is paid to the auctioneer he is entitled to retain it until the contract is completed, and should not part with the money without the sanction of both vendor and purchaser, as he is looked upon as a stakeholder(d) ; and is not therefore liable to pay any interest on the money.(e) But as the vendor appoints the auctioneer he is considered to be the agent of the vendor, who must accordingly bear any loss that

(a) *Warlow v. Harrison*, 1 El. & E. 295 ; 1 L. T. Rep. N. S. 211 ; *Johnston v. Boyes*, 80 L. T. Rep. N. S. 488 ; 68 L. J. 425, Ch. ; (1899) 2 Ch. 73 ; 47 W. R. 517.

(b) See 37 & 38 Vict. c. 78, s. 1 ; 44 & 45 Vict. c. 41, s. 3 ; 45 & 46 Vict. c. 39, s. 4 ; *et post*.

(c) *Gillat v. Gillat*, L. R. 9 Eq. 60. Sales by auction of goods which includes emblements, &c., are now put upon the same footing as sales by auction of land in this respect by 56 & 57 Vict. c. 71, s. 58 (3), and s. 62.

(d) *Dart's V. & P.* 205, 220, 6th edit. ; *Collins v. Stimson*, 11 Q. B. Div. 142 ; 52 L. J. 440, Q. B. ; 31 W. R. 921 ; 48 L. T. Rep. N. S. 828.

(e) *Harrington v. Hoggart*, 1 B. & A. 577.

may arise by the insolvency of the auctioneer.(a) If the deposit be large in amount it may be desirable to provide for its investment during the interval between the sale and the completion of the purchase.(b) And as the investment is made at the vendor's request he is entitled to any increase in the value of such investment, and must also bear any loss that may happen therein, whenever a binding contract has been entered into.(c)

Unless specially authorised the auctioneer has no power to receive the remainder of the purchase money.(d)

He may, however, with the concurrence of the vendor, take the purchaser's cheque for the deposit.(e) But without such consent an agent has no authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of any usage to the contrary.(f)

And the vendor himself is not bound to accept a cheque for the deposit, and may refuse to enter into the contract unless cash is paid.(g)

If the deposit be paid to the vendor's solicitor, he does not hold it as a stakeholder, but as agent for the vendor.(h)

Where there is no contract, or no contract which can be enforced, the purchaser is entitled to have his deposit returned.(i) However, a purchaser may by his conduct preclude himself from recovering the deposit.(k) When the purchaser is entitled to a return of his deposit he can, unless precluded by the contract or conditions (see *infra*, Condition No. 4.) also claim interest thereon.(l)

The payment of the deposit being considered as an earnest of the performance of the contract, as well as a part payment of the purchase money, the purchaser cannot elect to forfeit the deposit and so avoid the contract.(m)

(3.) *Possession, interest, &c.*—This condition provides that the remainder of the purchase money shall be paid on a given day and at a specified place (usually at the office of the vendor's solicitor), and possession of the property be given on completion of purchase; but if such completion be

(a) *Fenton v. Brown*, 14 Ves. 144; Dart's V. & P. 208, 6th edit.

(b) 1 Prid. Conv. 38, 14th edit.

(c) *Burroughs v. Brown*, 9 Hare, 609.

(d) *Sykes v. Giles*, 5 M. & W. 645.

(e) *Farrar v. Lacey, and Company*, 31 Ch. Div. 42; 55 L. J. 149, Ch.; 53 L. T. Rep. N. S. 515; 34 W. R. 22, C. A.

(f) *Pape v. Westacot*, (1894), 1 Q. B. 272; 63 L. J. 222, Q. B.; 70 L. T. Rep. N. S. 18; 42 W. R. 131, C. A.; see also *Blumberg v. Life Interest Corporation* (1897), 1 Ch. 171; (1898), 1 Ch. 27.

(g) *Johnston v. Boyes* (1899), 2 Ch. 73; 68 L. J. 425, Ch.; 80 L. T. Rep. N. S. 488.

(h) *Edgell v. Day*, L. R. 1, C. P. 80; 35 L. J. 7, C. P.; 13 L. T. Rep. N. S. 328; 14 W. R. 87.

(i) *Casson v. Roberts*, 31 Beav. 613; 32 L. J. 105, Ch.; 7 L. T. Rep. N. S. 588.

(k) *Thomas v. Brown*, 1 Q. B. Div. 714; 45 L. J. 811, Q. B.; 35 L. T. Rep. N. S. 237.

(l) Dart's V. & P. 221, 6th edit.

(m) Dart, 220; *Crutchley v. Jerminham*, 2 Mer. 506; Fry, Sp. Perf. 66, 3rd edit.

delayed by any cause other than wilful default on the vendor's part, the purchaser shall pay interest on the remainder of the purchase money at the rate of 5*l.* per cent. per annum until completion, &c.

Where the condition provides that if from "any cause whatever the completion is delayed" after the day fixed, the purchaser shall pay interest, the condition can be enforced to this extent only: where the delay is occasioned by defects of title, which the vendor takes reasonable care and diligence to remove, and there is no wilful default or vexatious conduct on his part, the purchaser will have to pay interest from the day fixed for completion, and not from the time when a good title was first shown, although he is not in fault.(a)

But it appears that if the vendor is guilty of great delay, and the purchaser deposits his purchase money in a bank, and gives the vendor notice thereof, and that it is appropriated to the purchase, the vendor, after receipt of this notice, will not be allowed any higher rate of interest than is allowed by the bank on the money deposited.(b) And in one case it was held that after such deposit and notice the purchaser is relieved, as from the receipt of such notice by the vendor, from payment of interest on the purchase money, and that the vendor was only entitled to such interest, if any, as the bank allowed on the deposit.(c)

In a subsequent case, however, the last cited case was not followed, and it was again held that the purchaser could not under the above condition relieve himself from the payment of interest by setting apart the purchase money and giving the vendor notice thereof if there be no wilful default on the vendor's part (d); so that the above case may be disregarded.

Great delay by a vendor in completing the title to the property, as in obtaining the concurrence of a necessary party (e), or by neglecting to perfect his title by admission to copyhold until after the date fixed for completion, amounts to wilful default and disentitles him to interest on the purchase money.(f)

The condition usually concludes with a clause that the purchaser shall be entitled to the possession, or receipt of the rents and profits, of the property from the given date, all outgoings up to that date being cleared by the vendor, and all current rents and outgoings, if necessary, to be apportioned.

(a) *De Visme v. De Visme*, 1 Mac. & G. 336; *Sherwin v. Shakespeare*, 24 L. T. Rep. O. S. 45; *Williams v. Glenton*, 13 L. T. Rep. N. S. 727; 1 Ch. App. 200; *Re Woods and Lewis's Contract*, 78 L. T. Rep. N. S. 665; 67 L. J. 475 Ch.; (1898) 2 Ch. 211.

(b) *Re Monckton and Gilzean*, 27 Ch. Div. 555, 51 L. T. Rep. N. S. 320; 54 L. J. 257, Ch.; 32 W. R. 973.

(c) *Re Gold's and Norton's Contract*, 52 L. T. Rep. N. S. 321; 33 W. R. 333.

(d) *Re Riley to Streatfield*, 34 Ch. Div. 386; 56 L. J. 442, Ch.; 56 L. T. Rep. N. S. 48; 35 W. R. 470.

(e) *Hetling and Merton's Contract* (1893), 3 Ch. 269; 62 L. J. 783, Ch.; 69 L. T. Rep. N. S. 266; 42 W. R. 19, C.A.

(f) *Re Wilson and Steven's Contract* (1894), 3 Ch. 546; 63 L. J. 863, Ch.; 71 L. T. Rep. N. S. 388; 43 W. R. 23.

Where on the sale of three houses the vendor by his contract of sale agreed to discharge "all rates and outgoings" up to the time of completion, this was held to include the expense incurred under a local Act in improving the street in which the houses stood, the work being completed before the contract, though payment was not demanded from the vendor by the local authority till after completion of the purchase.(a)

If the purchase money, or part of it, has been paid before conveyance, and the contract has been rescinded or cannot be enforced through the want of title or other default of the vendor, the purchaser will be decreed to have a lien upon the estate in the hands of the vendor, for the amount so paid with interest.(b)

If there is any doubt as to the vendor's ability to make out and deliver a sufficient abstract by a specified day, it is better that no time should be specified for delivery by the vendor of the abstract of title, lest he should fail in doing so within the time named, or should deliver an imperfect abstract.(c) But if the abstract is not delivered within a reasonable time after notice by the purchaser to do this, he may rescind the contract and recover his deposit and expenses.(d)

(4.) *Requisitions*.—A condition also provides for the delivery of requisitions on the title within a fixed time, and subject thereto the title is to be deemed to be accepted. And if vendor is unable or unwilling to answer any requisition, he may rescind the contract and return the deposit without interest or costs, and the purchaser to return the abstract of title.

Where a condition mentions a time after "delivery of the abstract" for sending in requisitions, &c., this in any dispute as to time, will be held to mean the delivery of a perfect abstract, that is, an abstract as perfect as the vendor could furnish at the time of delivery, although it may be an abstract of a defective title.(e)

Therefore, an objection may be raised after the prescribed time arising out of any document called for before the expiration of that time,(f) or where the abstract does not raise the objection.(g)

The condition enabling the vendor to annul the contract of sale in case he is unable or unwilling to answer the purchaser's requisitions must be exercised in good faith. And there must be reasonable and substantial grounds for the vendor's being unwilling.(h)

(a) *Midgley v. Coppock*, 4 Ex. Div. 309; 48 L. J. 674, Ex.; 40 L. T. Rep. N. S. 870, C. A.; see also *Tubbs v. Wynne*, 66 L. J. 116, Q. B.; (1897), 1 Q. B. 74.

(b) *Wythes v. Lee*, 3 Drew. 396; *Dart's V. & P.* 506, 6th edit.; *Torrance v. Bolton*, L. R. 14 Eq. 124; 8 Ch. App. 118.

(c) *Dart's V. & P.* 141, 6th edit.

(d) *Compton v. Bagley* (1892), 1 Ch. 313; 61 L. J. 113, Ch.; 65 L. T. Rep. N. S. 706.

(e) *Dart's V. & P.* 141, 321, 6th edit.; *Gray v. Fowler*, L. R. 8 Ex. 249, 279; 42 L. J. 161 Ex.; 21 W. R. 916.

(f) *Blacklow v. Laws*, 2 Hare 40.

(g) *Re Cox and Neve* (1891), 2 Ch. 109; 64 L. T. Rep. N. S. 733.

(h) *Smith v. Wallace* (1895) 1 Ch. 385; 64 L. J. 240, Ch.; 71 L. T. Rep. N. 814; *Dudell v. Simpson*, 2 Ch. App. 102; 15 L. T. Rep. N. S. 305.

The condition cannot be relied upon by a vendor who has been guilty of wilful misrepresentation.(a) Nor where the vendor sells free from incumbrances and the purchaser asks for the concurrence of a mortgage,(b) unless the mortgage money exceeds the amount of the purchase money.(c) Nor can the condition be relied upon where the vendor shows no title at all(d); but it may be used where he has some title and has endeavoured to meet the purchaser's requirements and has failed to do so.(e)

Where the condition enables the vendor to annul the sale if objection be made "as to title, particulars, conditions, or any other matter or thing relating, or incidental to the sale," which he is unable or unwilling to comply with, he may rescind the contract on a matter of conveyance as well as on a matter of title.(f)

It is advisable to insert a clause in the condition as to rescinding the contract, empowering the vendor to do so notwithstanding any intermediate negotiation or litigation thereon. But this does not seem absolutely necessary in either of these events if there be no undue delay on the vendor's part.(g) But it would be too late to attempt to rescind the contract after judgment.(h)

With regard to the time fixed for completion, at law time was, prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), treated as of the essence of the contract, and the purchaser might recover his deposit unless the vendor could deduce and verify a marketable title, and give a conveyance at the time actually agreed upon.(i)

In equity, however, a different rule usually prevailed. That court considered that the general object being only the sale of an estate for a given sum, the particular day named was merely formal, and that the stipulation meant in truth that the purchase should be completed within a reasonable time, regard being had to the circumstances of the case, and the nature of the title to be made. Unreasonable delay will, however, of itself conclude either party.(k) And the equitable doctrine has no application where time has been made of the essence of the contract by express agreement(l); or where, from the nature of the property, or other circumstances, it is clear that such must have been the intention of the parties :

(a) *Dart's V. & P.* 180, 6th edit.

(b) *Re Jackson and Oakshott*, 14 Ch. Div. 851; 49 L. J. 523, Ch.; 28 W. R. 794.

(c) *Re Great Northern Railway Company and Sanderson*, 25 Ch. Div. 788; 53 L. J. 445, Ch.; 50 L. T. Rep. N. S. 87; 32 W. R. 519.

(d) *Bowman v. Hyland*, 8 Ch. Div. 508; 47 L. J. 501, Ch.

(e) *Re Deighton and Harris* (1898), 1 Ch. 458; 67 L. J. 240, Ch.; 78 L. T. Rep. N. S. 430; 48 W. R. 341, C. A.

(f) *Re Deighton and Harris*, *sup.*

(g) *Greaves v. Wilson*, 25 Beav. 290; *Isaacs v. Towell*, 78 L. T. Rep. N. S. 619; 67 L. J. 508, Ch.; (1898), 2 Ch. 285.

(h) *Re Arbib and Class* (1891) 1 Ch. 601; 60 L. J. 263, Ch.; 64 L. T. Rep. N. S. 217; 39 W. R. 305, C. A.

(i) *Dart's V. & P.* 482, 6th edit.; *Fry, Sp. Perf.* 489, 3rd edit.

(k) *Seton v. Slade*, 2 L. C. Eq. 475, 484, 485, 7th edit.; *Fry, sup.*; *Dart, sup.*

(l) *Honeyman v. Marryatt*, 21 Beav. 14, 24; 6 H. L. Cas. 112.

as where the property is of a wasting nature, as a leasehold for a short unexpired term, or a mine (*a*); or where the purchaser evidently requires the property for his residence. (*b*) So on the sale of a public house as a going concern, time is of the essence of the contract (*c*); and the vendor must have at the date fixed for completion a valid and existing licence upon which the purchaser can apply at once for interim protection under the licensing acts. (*d*)

And it is provided by 36 & 37 Vict. c. 66, s. 25, that stipulations in contracts as to time. &c., which would not before the passing of the Act have been deemed to be of the essence of such contracts in a court of equity are to receive in all courts the same construction and effect as they would have theretofore received in equity (sub-sect. 7).

When time is made the essence of the contract it may be waived by proceeding in the purchase after the time has elapsed. (*e*)

(5.) *As to title*.—Where there is a condition that the title to the property shall commence with a document of a date less than forty years back, and that the earlier title shall not be investigated or objected to, such a condition will not preclude the purchaser's right to object to the title if he can show it to be defective *aliunde*. (*f*)

But where a condition stipulates that the title shall commence with a specified document, and that the prior title, whether appearing on any abstract or not, shall not be required, investigated, or objected to, the purchaser will be precluded from making objections to the prior title. And it seems he cannot recover back his deposit; nor can the vendor, as a rule, enforce specific performance of the contract of sale. (*g*)

However, a stipulation that the title shall commence with a document less than forty years old must be fair and explicit, and should describe the nature of the deed so as to enable the purchaser to decide whether he will accept such a title. (*h*) For a vendor cannot under a general condition as to title cloak material defects of which he is aware, and thereby bind a purchaser, for on discovering the defect the purchaser may rescind the contract, (*i*) but if, on such a ground, the purchaser

(*a*) *Hudson v. Temple*, 29 Beav. 536, 543; 3 L. T. Rep. N. S. 495, 497.

(*b*) *Tilley v. Thomas*, 3 Ch. App. 61; 17 L. T. Rep. N. S. 422.

(*c*) *Cowles v. Gale*, 7 Ch. App. 12; 41 L. J. 14, Ch.; 20 W. R. 70.

(*d*) *Tadcaster Brewery Company v. Wilson* (1897), 1 Ch. 705; 66 L. J. 402, Ch.

(*e*) *Webb v. Hughes*, L. R. 10 Eq. 281; 39 L. J. 606, Ch.

(*f*) *Re Marsh and Lord Granville*, 24 Ch. Div. 11; 53 L. J. 81, Ch.; 31 W. R. 845, C. A.; *Re Cox and Neave's Contract* (1891), 2 Ch. 109; 64 L. T. Rep. N. S. 733.

(*g*) *Re National Provincial Bank of England and Marsh* (1895), 1 Ch. 190; 71 L. T. Rep. N. S. 629; 64 L. J. 255, Ch.; Fry, Sp. Perf. 594, 3rd edit.: *Scott v. Alvarez* (1895), 2 Ch. 603; 64 L. J. 821, Ch.; 73 L. T. Rep. N. S. 43.

(*h*) *Re Marsh and Lord Granville*, sup.

(*i*) *Edwards v. Wickwar*, L. R. 1 Eq. 68; 35 L. J. 48, Ch.; 13 L. T. Rep. N. S. 428; 14 W. R. 79; *Broad v. Munton*, 12 Ch. Div. 131; *Nottingham Brick & Tile Company v. Butler*, 16 Q. B. Div. 778; 55 L. J. 280 Q. B.; 54 L. T. Rep. N. S. 444; 34 W. R. 405.

avoids the contract he will not, as a rule, be entitled to recover back his deposit.(a)

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 3 (11), does not alter the effect of such a condition as that above stated.(b)

(6.) *Error in description, &c.*—This condition usually provides that error in description shall not annul the sale, but be made the subject of compensation.

Notwithstanding this condition where the misdescription, though not proceeding from fraud, is on a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract, then the contract is void altogether, and the purchaser is not bound to accept compensation.(c)

Consequently this condition will not enable the vendor to enforce the contract against an unwilling purchaser where a leasehold, however long, is described as a freehold(d); or copyhold is described as freehold(e); or generally where an underlease is sold as an original lease(f); or when on the sale of an estate the occupation rent is over-stated, so as to mislead(g); or where the property is described as a freehold ground rent, but in reality is a rent covenanted to be paid by the lessee(h); or where a house is described as brick built and is really built externally, partly of brick and partly of timber, and in some parts of lath and plaster; or where a material part of the property has no existence and cannot be found, or where no title can be shown to it(i); or where a right to use the kitchen of the tenement sold was not disclosed.(k)

However a purchaser may generally insist upon having all the vendor can convey with a compensation for the difference(l); but this right is confined to the class of cases where the vendor knew the defect and the purchaser did not.(m) For if the purchaser is from the first aware of the

(a) *Best v. Hammond*, 12 Ch. Div. 1; 48 L. J. 503, Ch.; *Re National Provincial Bank of England and Marsh*, sup.; *Scott v. Alvarez*, sup.

(b) *Nottingham Brick and Tile Company v. Butler*, sup.

(c) *Flight v. Booth*, 1 Bing. N. C. 370; *Re Fawcett and Holmes*, 42 Ch. Div. 150 58 L. J. 763, Ch.; 61 L. T. Rep. N. S. 105, *et ante*, p. 41.

(d) *Dart's V. & P.* 154, 6th edit.; *Sug. Conc. V. & P.* 221, 225.

(e) *Hart v. Swaine*, 7 Ch. Div. 42; 26 W. R. 30; *Upperton v. Nicholson*, 6 Ch. App. 436; 40 L. J. 401, Ch.; 25 L. T. Rep. N. S. 4; 19 W. R. 733.

(f) See *Dart's V. & P.* 155, 6th edit.; *Re Beyfus and Masters*, 39 Ch. Div. 110; 59 L. T. Rep. N. S. 740; 37 W. R. 261.

(g) *Dimmock v. Hallet*, 2 Ch. App. 21; 36 L. J. 146, Ch.; 15 L. T. Rep. N. S. 374; 15 W. R. 93.

(h) *Evans v. Robins*, 1 H. & C. 302; 33 L. J. 63, Exch.

(i) See *Dart's V. & P.* 155, 6th edit.; 1 *Prid. Conv.* 30, 14th edit.; p. 29, 16th edit.

(k) *Heywood v. Mallalieu*, 25 Ch. Div. 357; 53 L. J. 492, Ch.; 32 W. R. 538.

(l) *Sug. V. & P.* 308, 14th edit.; *Mortlock v. Buller*, 10 Ves. 315; *Barnes v. Wood*, L. R. 8 Eq. 424; but see *Thomas v. Dering*, 1 Ke. 729.

(m) *Hopcraft v. Hopcraft*, 76 L. T. Rep. N. S. 341.

vendor's incapacity to convey the whole of what he contracts for, he cannot insist on having what the vendor can convey with an abated price.(a) And if in addition to the condition as to compensation there is also a clause enabling the vendor to rescind the contract of sale, the purchaser cannot obtain specific performance with compensation if the vendor insists upon his right to rescind the contract.(b)

A condition that error in description shall not annul the sale and that no compensation shall be allowed has been held to apply to slight errors of quantity only, although there are qualifying words used, such as "thereabouts," after a statement of acreage. But doubts have been thrown upon this decision.(c)

It has been held that under a condition that "if any error, misstatement or omission in the particulars be discovered the same shall not annul the sale" but be made good by compensation, an action may be brought thereon for compensation, even after a conveyance of the property to the purchaser has been executed, if it is found that the particulars of sale were incorrect and the value of the land diminished. For the contract of sale is not, on this point, merged in and ended by the deed of conveyance.(d) It may be advisable, therefore, to introduce into such a condition the words "before the completion of the purchase," or words to that effect after the provision as to the discovery of errors, &c. But it appears that if there be no condition that error in description shall not annul the sale, &c., and no fraud, the purchaser could not recover after the conveyance.(e)

(7.) *The Conveyance*.—A condition usually provides that the deed of conveyance shall be prepared by and at the purchaser's expense.

Independently of this condition the purchaser must at his own expense prepare and tender a conveyance of the property; and, if it be copyhold, must also bear the expense of the surrender to himself, and the fine due on his own admission. But in the absence of stipulation the costs and expenses attending the perusal and execution of the conveyance by the necessary conveying parties fall on the vendor, including the costs of matters essential to the validity of the deed, as the acknowledgments by married women, and the enrolment of a disentailing deed.(f)

(8.) *As to Resale, &c.*—It is then provided by a condition that the vendor may resell the property or lot in case of default by the purchaser,

(a) *Castle v. Wilkinson*, 5 Ch. App. 534; Fry, Sp. Perf. 526, 537, 2nd edit.

(b) *Re Terry and White's Contract*, 32 Ch. Div. 14; 55 L. J. 345, Ch.; 54 L. T. Rep. N. S. 353; 34 W. R. 379, C. A.; *Ashburner v. Sewell* (1891) 3 Ch. 405; 60 L. J. 784, Ch.; 65 L. T. Rep. N. S. 524; 40 W. R. 169.

(c) See and compare *Whittemore v. Whittemore*, L. R. 8 Eq. 603; and *Re Terry and White's Contract*, sup.

(d) *Turner v. Skelton*, 13 Ch. Div. 130; 41 L. T. Rep. N. S. 668; 49 L. J. 114, Ch.; 28 W. R. 312; *Palmer v. Johnson*, 13 Q. B. Div. 351; 51 L. T. Rep. N. S. 211; 33 W. R. 37, C. A.

(e) *Joliffe v. Baker*, 11 Q. B. Div. 255; *Clayton v. Leech*, 41 Ch. Div. 103; 61 L. T. Rep. N. S. 69, C. A.

(f) David. Conv. 570, 4th edit.; Dart's V. & P. 798, 6th edit.

and that the deposit shall be forfeited, and any loss that may occur on a resale may be recovered as liquidated damages.

Without this condition the vendor is entitled in case of default by the purchaser to retain the deposit if the purchaser makes default in performing his contract, as the deposit is regarded not only as a part payment of purchase money but also as an earnest of the performance of the contract.(a)

So under this condition the vendor may retain the deposit and resell, and if he resells at a loss he can recover so much of the deficiency as is not covered by the deposit.(b)

Where the contract is rescinded on account of the purchaser's default, and the title on a resale is found to be bad, the purchaser in the first sale cannot recover his deposit.(c)

A memorandum of purchase is added at the foot of the conditions, as sales of land by auction come within the 4th sect. of the Statute of Frauds (29 Car. 2, c. 3.)

This memorandum to be binding, must contain either the names of the contracting parties, or such a description of them as sufficiently identifies them. The term "proprietor," or "owner," or "mortgagee," is sufficient to satisfy the statute; but not "vendor," or "client," or "friend" of a named agent, or "solicitor to the vendor," even when the solicitor is himself the vendor, nor "landlord." And a contract invalid under the Statute of Frauds for not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew at the time of the contract who the vendor was.(d)

Trustees.—We have already shown under what circumstances trustees may sell the trust estate, also that where a trust for sale or a power of sale of property is vested in them they may, unless a contrary intention is expressed in the trust instrument, sell or concur in selling the trust property, together or in lots, by public auction or private contract, subject to such conditions of sale as the trustees may think fit, with power to vary or rescind the contract of sale, and to buy in and resell without being answerable for any loss.(e)

And as to sales made since 24th December, 1888, no sale by them can be impeached by the *cestui que trust* upon the ground that any of the conditions of sale may have been unnecessarily depreciatory, unless it appears that the consideration for the sale was thereby rendered inadequate. And after the conveyance, the sale cannot be impeached as

(a) *Ante*, p. 43, Dart's V. & P. 185, 6th edit.; *Ex parte Barrell*, 10 Ch. App. 512; 33 L. T. Rep. N. S. 115; 23 W. R. 846; *Soper v. Arnold*, 14 App. Cas 429; 59 L. J. 214; 61 L. T. Rep. N. S. 702; 38 W. R. 449.

(b) *Ockenden v. Henley*, 1 E. B. & E. 485; Dart, *sup.*

(c) *Soper v. Arnold*, *sup.*

(d) *Rossiter v. Miller*, 3 App. Cas. 1124; 48 L. J. 10, Ch.; 39 L. T. Rep. N. S. 173; 26 W. R. 865; *Jarrett v. Hunter*, 34 Ch. Div. 182; 56 L. J. 141, Ch.; 55 L. T. Rep. N. S. 727; 35 W. R. 132; *Coombs v. Wilks* (1891), 3 Ch. 77; 61 L. J. 42, Ch.; 65 L. T. Rep. N. S. 56; 40 W. R. 77.

(e) See *ante*, p. 24, *et seq.*

against the purchaser on this ground, unless it appears he was acting in collusion with the trustees at the time of the sale. And they may sell or buy without excluding the application of sect. 2 of the Vendor and Purchaser Act, 1874.(a) Formerly depreciatory conditions might have amounted to a breach of trust.(b)

However, as a rule, fiduciary vendors must show a marketable title, and are liable to a purchaser as if they were absolute owners, save that they can only be required to enter into a covenant express, or implied under sect. 7 of the Conveyancing Act, 1881, that they have done no act to encumber the trust property, and cannot be compelled to give the other ordinary covenants for title.(c) It would be advisable, however, to state in the conditions of sale, or agreement of purchase, that the vendor being a trustee will only enter into the above limited covenant.(d) Also if he retains the title deeds, that he will only give an acknowledgment of the right to production and delivery of copies thereof under the provisions of sect. 9 of the Conveyancing and Law of Property Act, 1881, and will not give any undertaking or covenant for their safe custody.(e)

The question of the transmission of a trust or power given to several persons will be found treated of in the chapter on "Settlements."

It has also been shown (f) that under the Land Transfer Act, 1897, in case of a death after 31st Dec., 1897, a real representative is established giving executors and administrators powers of dealing with a deceased person's real estate, which they did not, as a rule, before possess.

Mortgagees.—As to conditions of sale when mortgagees are vendors, see *post*, tit. "Mortgages."

Special Conditions.

The foregoing is a brief statement of the law and practice relating to the usual conditions of sale of freehold property. There are many cases however, in which special conditions will still be necessary. We may instance the following :

- (1) Where timber, trees, or fixtures on the estate sold are to be paid for separately from the land.
- (2) Where the title cannot be carried back forty years.
- (3) When it is necessary to prevent a purchaser calling for evidence of seizin when the abstract commences with a will.
- (4) Where deeds dated before 16th May, 1888, are not properly stamped.
- (5) Where any difficulty as to identifying the property is likely to arise.
- (6) To give the purchaser the benefit of any fire insurance.

(a) 56 & 57 Vict. c. 53, ss. 14 and 15.

(b) *Dinn v. Flood*, 28 Ch. Div. 586; 54 L. J. 370, Ch.; 33 W. R. 315.

(c) Dart's V. & P. 94, 146, 6th edit.; *Re Bryant and Barningham's Contract*, 44 Ch. Div. 218; 59 L. J. 636, Ch.; 62 L. T. Rep. N. S. 53; 33 W. R. 469: *et ante*, pp. 27, 28, 29.

(d) Dart's V. & P. 94, 146, 6th edit.

(e) Wolst. & T. Conv. 42, 5th edit.; 48, 8th edit.

(f) *Ante*, pp. 29 to 33.

(7) Where a vendor retains the title deeds to provide for a statutory acknowledgment of the right of purchaser to production and to delivery of copies, &c., or where deeds are lost.

(8) As to tithe, land tax, &c., so no doubt there may be many other cases where it will be necessary, from the state of a title, to protect a vendor against requisitions thereon. We will however, briefly notice the points to be attended to in framing the above special conditions.

Timber, &c.—As the standing timber will pass as part of the freehold on a conveyance thereof, a special condition is necessary to exclude this rule; and the condition must state that it is to be paid for separately if this is intended and make provision for assessing the value thereof. As to what is “timber,” this expression means trees fit to be used in building and repairing houses, and includes oak, ash and elm, in any county, and by local custom, also beech and some other trees. No wood, however, is timber until of twenty years growth. A grant of “timber and timber-like trees,” includes not only ordinary timber, and such trees as by local custom are considered timber, but even what are known as “thinnings,” and sound pollards.(a)

In the absence of any express stipulation common *fixtures*, including such as are not strictly fixtures, will be held to be included in a contract for sale, and will pass by the conveyance, unless a contrary intention appears by the conveyance (b) Therefore provision must be made for the value thereof to be assessed and paid for separately, if that is intended.

Limiting Title.—In those cases where the vendor is unable to carry back the title for the full statutory period of 40 years, the purchaser's right thereto must be negatived by a special condition to the effect already shown.(c)

Seizin.—As to when a special condition is necessary to negative a purchaser's right to evidence of seizin where the title commences with a will, see *post* tit. “Abstract of Title.”

Stamps.—The vendor is, as a rule, responsible for his title deeds and documents being properly stamped(d); and if any documents executed prior to 16th May, 1888, are not properly stamped, a condition should be inserted stating that the purchaser shall not make any objection or requisition in respect thereto. But as to documents dated after the above period such a stipulation is of no effect; as it is provided by 54 & 55 Vict. c. 39, that no condition precluding a requisition on the ground of absence or insufficiency of stamp upon any instrument executed after 16th May, 1888, shall be valid; and every contract for assuming liability for the absence or insufficiency of stamp thereon is void (sect. 117).

Identity of parcels.—Where there is any difficulty likely to arise as to the vendor's ability to identify the property sold, a condition should be

(a) Dart's V. & P. 149, 6th edit; *Dashwood v. Magniac* (1891), 3 Ch. 306; 60 L. J. 809, Ch.

(b) 1 Dart's V. & P. 149, 6th edit.; Sug. Conc. V. & P. 23. (c) *Ante*, p. 48.

(d) *Whiting to Loomes*, 17 Ch. Div. 10; 50 L. J. 463, Ch.; 29 W. R. 35; *Coleman v. Coleman*, 79 L. T. Rep. N. S. 66; and see *post*.

inserted negating the purchaser's right to call for proof of identity.(a) But a condition that the purchaser is not to require any further proof of identity than that given by the title deeds, although it exempts the vendor from producing further evidence, it does not enable him to force the title upon the purchaser unless the evidence is complete upon the deeds.(b)

Identity is as much matter of title as devolution.(c)

Insurance.—As to a condition giving the purchaser the benefit of any fire insurance effected on the premises by the vendor. If the premises are burned down between the date of the contract and the completion of the purchase, the purchaser cannot, without stipulation to that effect, claim the amount of the insurance money from the vendor, but he is nevertheless bound to pay the purchase money.(d) However, as a fire policy is only a contract of indemnity, the vendor on receiving the purchase-money must repay to the insurance company the amount received from the company for the loss by the fire.(e) And the purchaser not only has an insurable interest in the property from the date of the contract (f), but it seems also a sufficient interest therein to enable him to apply for reinstatement of the premises under 14 Geo. 3, c. 78, s. 83, which enables any person interested in the premises insured to apply to the directors to have the insurance money so laid out.(g) This Act, though applying to the metropolis, has been held to be of general application.(h) However, this has been doubted.(i)

The condition usually used states that any insurance against fire subsisting on the property shall be for the benefit of the purchaser, the vendor being a trustee thereof for him, but that the vendor shall not be bound to keep up or renew the same, and the purchaser shall not be entitled to the insurance money until completion.(k)

As to Custody of Deeds, &c.—Where an estate has been sold in lots, the purchaser of the lot or portion of highest value is, in the absence of stipulation to the contrary, entitled to their custody; but under a condition that the purchaser of the largest lot shall have them, the purchaser of the largest lot in superficial area will be entitled to the deeds.(l) And when a vendor retains any part of an estate to which the

(a) Dart's V. & P. 174, 6th edit.

(b) *Curling v. Austin*, 2 Dr. & S. 129; 10 W. R. 682; and see *Flower v. Hartopp*, 6 Beav. 476.

(c) *Brown v. Wales*, L. R. 15 Eq. 142.

(d) *Rayner v. Preston*, 18 Ch. Div. 1; 50 L. J. 472, Ch.; 44 L. T. Rep. N. S. 787; 29 W. R. 546.

(e) *Castellain v. Preston*, 11 Q. B. Div. 380; 52 L. J. 366, Q. B.; 49 L. T. Rep. N. S. 29; 31 W. R. 557; *West of England Fire Insurance Company v. Isaacs* (1897) 1 Q. B. 226; 66 L. J. 36 Q. B.

(f) Dart's V. & P. 197, 6th edit.

(g) *Rayner v. Preston*, sup.; Dart, sup.

(h) See *Ex parte Gorely*, 11 L. T. Rep. N. S. 319; 13 W. R. 60; Dart, sup.

(i) See *Westminster Fire Office v. Glasgow, &c., Society*, 13 App. Cas. at p. 716.

(k) See 1 Key & Elph. Conv. 289, 3rd edit.; 1 Prid. Conv. 89, 14th edit.; 67, 17th edit.

(l) *Griffiths v. Hatchard*, 1 Kay & J., 17.

documents of title relate, he is entitled to retain such documents.(a) In such cases the person retaining possession of the documents gives the acknowledgment and undertaking provided for by 44 & 45 Vict. c. 41. s. 9 (which will be fully considered in subsequent pages), unless he be the vendor and negatives the purchaser's right by stipulation. If the vendor be a trustee or mortgagee, he should stipulate that he will only give an acknowledgment and not an undertaking.(b)

And it has been held that the word "estate" in rule 5 of sect. 2 of 37 & 38 Vict. c. 78, means part of an estate in *land* only. And where a mortgagee vendor had included in the same mortgage deed, land and a policy of insurance, and sold the land under his power, and retained the policy, it was held that the purchaser of the land was, on completion, entitled to have the mortgage deed delivered over to him; as the vendor retained no part of the "estate," but only the policy of insurance.(c) If therefore, in a case like this, the vendor wishes to retain the title deeds he must so expressly stipulate by a clause or condition.

Lost deeds.—Where documents of a date subsequent to the date of the commencement of the vendor's title are lost or cannot be produced, the purchaser's right to their production or to call for further evidence as to their contents and execution than the vendor can produce, should be negatived by stipulation. However, the mere fact that the title deeds to property sold have been lost or mislaid does not release the purchaser from the performance of his contract. He can be compelled to complete if he is furnished in proper time with clear and satisfactory secondary evidence as to the contents of such deeds, and as to their having been duly executed, and properly stamped.(d)

Tithes.—Upon a sale of tithes held as a lay property, or of other property held under a grant from the Crown, the vendor should protect himself by a condition of sale or clause in the agreement of sale from being required to produce the original grant if it be lost or not in his possession.(e)

Tithe is a burden on the land the existence of which is presumed in the absence of stipulation and has never been deemed an incumbrance, and therefore need not, as a rule, be referred to in the particulars or conditions of sale.(f)

The ownership by the same person of both the tithe and the land out of which the tithe issues does not cause the merger of the tithe in the land.(g) But the owner in fee or in tail, or even for life of both the land and tithe, or tithe rentcharge, is empowered by deed duly confirmed, to

(a) 37 & 38 Vict. c. 78, s. 2, r. 5.

(b) Wolst. & T. Conv. 39, 42, 5th edit.; 48, 8th edit.

(c) *Re Williams, &c., or Fuller and Leathley's Contract* (1897) 2 Ch. 144; 66 L. J. 543, Ch.; 76 L. T. Rep. N. S. 646; 45 W. R. 627.

(d) *Bryant v. Busk*, 4 Rus. 1; *Re Halifax Commercial Bank and Wood*, 79 L. T. Rep. N. S. 536, C. A.

(e) Dart's V. & P. 188, 6th edit.; 1 Prid. Conv. 63, 14th edit.

(f) Sug. V. & P. 322, 14th edit.; Dart's V. & P. 399, 6th edit.

(g) Will. R. P. 334, 13th edit.; 6 & 7 Will. 4, c. 71, s. 71.

merge the tithe or rentcharge in the inheritance of the lands charged therewith.(a)

If therefore the property sold is declared to be tithe free, as by virtue of a prescriptive composition, called a *modus decimandi*, or by a merger under the Tithe Acts just cited, a special condition will be necessary, precluding a purchaser from demanding any other evidence of exemption than the vendor is able to give.

Where the estate is charged with a tithe rentcharge and is to be sold in lots, provision should be made by a condition for the apportionment of the rentcharge on the different lots, at the expense of the purchasers.(b)

By 54 & 55 Vict. c. 8, tithe rentcharge is now payable by the owner of the land notwithstanding any contract to the contrary by any occupier of the land.

Land Tax.—Land tax like tithe, is also presumed to be a charge on the property if not noticed in the conditions or contract, and is not considered as an incumbrance. But if stated to be redeemed its redemption should be proved by the certificate of the commissioners, the receipt of the cashier of the Bank of England, and the memorandum of registration. And if the vendor cannot produce this evidence he should negative the purchaser's right to call for it, and state what evidence he intends to give of the redemption of the tax.(c) By 59 & 60 Vict. c. 28, new provision is made for redemption of land tax, under which the owner of any land may redeem the land tax charged thereon by payment to the commissioners of Inland Revenue of a capital sum equal to thirty times the sum assessed on such land by the assessment last made and signed; which may be paid either in a single payment, or by such annual payments as may be agreed upon with the commissioners (sect. 32.) These receipts would have to be produced, therefore, or their production negatived by special condition. See also s. 33.

Land tax, tithe rentcharge and payments in lieu of tithes or of tithe rentcharge are not to be deemed incumbrances within the meaning of the Land Transfer Act, 1875.(d)

Apportionment of Rents.—Where freehold property is sold in lots, the whole of which is let on lease at an entire rent, the conditions of sale should provide for the apportionment of the rent, and state that if the tenant's concurrence in the apportionment cannot be obtained, the purchasers should be precluded from taking objection on that account.(e)

And where a leasehold estate is to be sold in lots, the whole being held at an entire rent, and the lessor will not consent to grant new leases to the several purchasers, it should be stipulated that the lease shall be assigned

(a) See 6 & 7 Will. 4, c. 71, s. 71; 1 & 2 Vict. c. 64, ss. 1, 3, 4; 52 & 53 Vict. c. 30, ss. 2, 11.

(b) See a form 1 David. Conv. 690, 4th edit.

(c) 42 Geo. 3, c. 116, s. 38; Dart's V. & P. 323, 398, 6th edit.

(d) 38 & 39 Vict. c. 87, s. 18; *et post tit.* "Land Transfer Acts and Rules."

(e) 1 David. Conv. 547, 4th edit; p. 452, 5th edit.; 1 Prid. Conv. 34, 14th edit.; p. 54, 17th edit.

to the largest purchaser in value, and that he shall grant derivative leases for the whole term less one day to the other purchasers, reserving to himself the apportioned rents and containing the usual covenants. In some cases, however, mutual covenants for payment of the apportioned parts of the rent are entered into with cross powers of distress and entry(a); and it is thought such a power would not bring the case within the Bills of Sale Acts, as the power is to distrain for a rent rather than for a debt.(b)

Leaseholds for Years.—Upon a sale of leaseholds it was usual, in addition to the ordinary conditions, to stipulate that the purchaser should not investigate or call for the production of the title of the lessor, or his right to grant the lease: also that the last receipt for rent should be conclusive evidence that the covenants in the lease had been performed. These conditions are, however, no longer necessary on the sale of leaseholds for years, as the 37 & 38 Vict. c. 78, s. 2, enacts that subject to any stipulation to the contrary, under a contract to grant or assign a term of years, the intended lessee or assign shall not be entitled to call for the title to the freehold. This section, it will be seen, only protects the title to the *freehold*. Therefore, under an open contract to grant or assign an *underlease*, the right of the immediate lessor to grant such underlease might have been inquired into. The 44 & 45 Vict. c. 41, s. 3, sub-ss. 1, 9, 10, however, enacts that under a contract made after the commencement of the Act to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not, in the absence of stipulation to the contrary, have the right to call for the title of the leasehold reversion. And sect. 13 provides that in the absence of stipulation to the contrary, on a contract to grant a lease for a term of years out of a leasehold interest with a leasehold reversion, the intended lessee is not to have a right to call for the title to that reversion.

These enactments do not apply to a lease for lives. It will be noticed that sect. 2 of 37 & 38 Vict. c. 78, says "subject to any stipulation to the contrary," &c., and it has been held that an agreement by the freeholder to deliver to the intended lessee an abstract of his title to grant the lease is a stipulation to the contrary, and the intended lessee is entitled to have the abstract verified in the usual way.(c)

The above section does not prevent a purchaser proving *aliunde* that the title is bad.(d) But it does not relieve the lessee or purchaser from constructive notice of anything which he could have discovered had he examined the title. He is in the same position, as to notice, as if he had before the Act agreed not to inquire into the lessor's title.(e)

(a) See Dart's V. & P. 148, 6th edit.; 1 David. Conv. 545, 4th edit.; p. 453, 5th edit.

(b) See and compare *Lee v. Roundwood Colliery Company*, (1897) 1 Ch. 373; 75 L. T. Rep. N. S. 641; 66 L. J. 186, Ch.; 45 W. R. 324, C. A.; and *Stevens v. Marston*, 60 L. J. 192, Q. B.; 64 L. T. Rep. N. S. 274; 39 W. R. 129, C. A.

(c) *Re Purcell and Deakin*, (1893) W. N. 152.

(d) *Jones v. Watts*, 43 Ch. Div. 574; 62 L. T. Rep. N. S. 471; 38 W. R. 725.

(e) *Patman v. Harland*, 17 Ch. Div. 353, 359; 50 L. J. 642, Ch.; 44 L. T. Rep. N. S. 728; 29 W. R. 707.

The words "leasehold reversion" in sect. 3 (1) of 44 & 45 Vict. c. 41 (*supra*), refer not to the lease out of which it is intended to grant the underlease, but to the reversion expectant on that leasehold interest, and the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds.(a)

The 45 & 46 Vict. c. 39, s. 4, further enacts that where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease, is not, for the purpose of the deduction of title to an intended assign, to form part of the title, or evidence of title to the lease. This applies to leases made either before or after 1st January, 1883.

As to the condition that the last receipt for rent should be evidence of the performance of the covenants in the lease, the 44 & 45 Vict. c. 41, s. 3, sub-ss. 4, 5, 9, 10, enact, that as to sales after this Act a purchaser is to assume unless the contrary appears that the lease or underlease was duly granted, and that the production of the receipt for the last payment due for rent is to be evidence of performance of covenants, &c., and in the case of an underlease, also of performance of covenants in the superior lease, up to the date of the actual completion of the purchase, unless a contrary intention is expressed in the contract of sale.

"Payment due for rent," within sect. 3 (4), applies only to a money payment. A receipt for payment of a peppercorn rent is not within the meaning of the sub-sect.(b)

As to the apportionment of an entire rent when a leasehold estate is sold in lots, see *ante*, p. 56.

Conditions under the Land Transfer Acts.—As to conditions relating to titles under these Acts, see *post*, "The Land Transfer Acts and Rules," sub-tit. *Transfer of freehold land*.

Completion of Particulars and Conditions, &c.

The particulars and conditions of sale being drawn and settled, a fair copy of each must be made and returned to the auctioneer, who will get them printed and forward proofs to the solicitor for the vendor, who will examine them and ascertain that they are correct. This done, they are returned to the auctioneer, who will cause a sufficient number of copies to be printed from the corrected proofs.

He will also advertise the sale in the proper newspapers, and by placard, and distribute the particulars and conditions of sale in the usual way.

The day of sale having arrived, the vendor's solicitor attends at the place of sale to give any information that may be necessary, receive the deposit, and see that the contract of purchase is signed by the purchaser.

(a) *Gosling v. Woolf* (1893) 1 Q. B. 39; 68 L. T. Rep. N. S. 89; 41 W. R. 106.

(b) *Re Moody and Yates*, 30 Ch. Div. 344; 54 L. J. 886, Ch.; 53 L. T. Rep. N. S. 845.

The Contract of Sale.

The requisites of a binding contract for the sale of lands, tenements, or hereditaments, or any interest therein, enforceable by action, may be thus briefly summarised: The contract must be (1) in writing signed by the party to be charged therewith or his lawful agent, and (2) made between parties able and willing to contract, (3) for a sufficient consideration, which must not be illegal, and (4) the contract must specify the subject matter of the bargain, and be clear and definite.

The Writing and Signatures.—As to the first requisite, the 4th sect. of the Statute of Frauds (29 Car. 2, c. 3), enacts that no action shall be brought to charge any person upon any agreement for the sale of any lands, tenements, or hereditaments, unless such agreement is in writing, signed by the party to be charged or his lawful agent.

The signature may be in pencil, or by an illiterate person making his mark, or by a person stamping his name, if he is in the habit of so doing; and, although the signature is usually at the foot of the agreement, it need not be so; it may be at the beginning, if it appears that it was so placed thereby intending to give effect to or to authenticate the entire agreement.(a) The agent may be appointed by parol (b) The auctioneer by his appointment becomes the vendor's agent, having implied authority at the time of sale, but not afterwards, to bind the vendor by his signature to the agreement. So a purchaser by bidding gives the auctioneer a like authority, unless in either case this authority is revoked before the fall of the hammer.(c) But the auctioneer's clerk has not, it seems, such an authority.(d)

If an agent employed to bid for an estate exceed the limit as to price, and his want of authority is unknown to the other party, the agent is bound and the principal is free.(e)

As to contracts by companies formed under the Companies Act, 1862, see 30 & 31 Vict. c. 131, s. 37.

The 4th sect. of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedy, by which, if in writing, they might have been enforced.(f)

The contract is binding if signed by one party only, as the section only requires it to be signed by the party to be charged.(g)

(a) *Cato v. Caton*, 35 L. J. 292, Ch.; 36 *Id.* 886; L. R. 2 H. Ld. Cas. 127; Dart's V. & P. 269, 270, 6th edit.

(b) *Coles v. Trecothick*, 9 Ves. 250; *Heard v. Pilley*, 4 Ch. App. 548.

(c) Dart's V. & P. 209, 6th edit.; *Buckmaster v. Harrop*, 13 Ves. 456; *Bell v. Balls*, 76 L. T. Rep. N. S. 254; (1897) 1 Ch. 663; 66 L. J. 397, Ch.

(d) *Peirce v. Corf*, L. R. 9 Q. B. 210; 29 L. T. Rep. N. S. 919; *Bell v. Balls*, sup.

(e) Dart, sup. 211.

(f) *Britain v. Rossiter*, 11 Q. B. Div. 123; 48 L. J. 362, Q. B.; 27 W. R. 482; *Maddison v. Alderson*, 8 App. Cas. 467, 474; 52 L. J. 737, Q. B.; 49 L. T. Rep. N. S. 303; 31 W. R. 820.

(g) *Seton v. Slade*, 2 L. C. Eq. 475, 7th edit.; and see *Shardlow v. Cotterell*, 20 Ch. Div. 90; 45 L. T. Rep. N. S. 572; 51 L. J. 353, Ch.; 30 W. R. 143.

Letters which have passed between the parties will operate as a binding agreement for the sale and purchase of real estate when they contain all the particulars necessary to form a complete contract, as a description of the property, the price to be paid, &c. There must be an offer on the one side, and a simple acceptance on the other, without introducing any new stipulation or any exception. If the letters merely amount to a treaty neither party can enforce them.(a) But where the simple acceptance of an offer contains a statement that the acceptor will instruct his solicitor to prepare an agreement, this does not render it a conditional acceptance.(b) However, if the parties, by subsequent negotiation in the matter, show that they do not consider the letters as a binding agreement, as where they both in subsequent letters stipulate for important additions, specific performance will not be ordered.(c) And the acceptance may be made subject to a condition that a formal contract should be prepared by a solicitor, and signed by the parties.(d) A counter offer amounts to a rejection of the original offer which is not revived by a subsequent tender of acceptance thereof.(e)

As to how far parol evidence can be given to connect two documents which it is alleged form a contract; it seems to be this: on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol except the identity as it were of the document.(f)

Not only may letters which have passed between the parties amount to an agreement, but a receipt for the purchase money, if it contain all the terms, will be a sufficient agreement to satisfy the Statute of Frauds, which only requires the contract to be signed by the party to be charged.(g)

An offer to sell may be recalled at any time before it is accepted, and an offer to purchase may in like manner be recalled or modified.(h) If the answer to an offer by post is sent by letter by post it is binding on the writer as soon as it is posted.(i) But this doctrine does not apply to the

(a) Sug. Conc. V. & P. 80, 84; *Holland v. Eyre*, 2 Sim. & S. 194; *Rossiter v. Miller*, 3 App. Cas. 1124; 39 L. T. Rep. N. S. 173; 48 L. J. 10 Ch.; 26 W. R. 865.

(b) *Rossiter v. Miller*, sup.; *Bolton Partners v. Lambert*, 41 Ch. Div. 295; 58 L. J. 425, Ch.; 60 L. T. Rep. N. S. 687, C. A.

(c) *Hussey v. Horne Payne*, 4 App. Cas. 311; 41 L. T. Rep. N. S. 1; *Bristol Aerated Bread Company v. Maggo*, 44 Ch. Div. 616; 62 L. T. Rep. N. S. 416; 59 L. J. 472, Ch.

(d) *Crossley v. Maycock*, L. R. 18 Eq. 181; *Hawksworth v. Chaffey*, 55 L. J. 335, Ch.; 54 L. T. Rep. N. S. 72; *Page v. Norfolk*, 70 L. T. Rep. N. S. 781 C. A.

(e) *Hyde v. Wrench*, 3 Beav. 334.

(f) *Peirce v. Corf*, L. R. 9 Q. B. 210; 29 L. T. Rep. N. S. 919; *Potter v. Peters* (1895) W. N. 37; 72 L. T. Rep. N. S. 624; 64 L. J. 357, Ch.

(g) *Shardlow v. Cotterell*, 20 Ch. Div. 90; 51 L. J. 353, Ch.; 45 L. T. Rep. N. S. 572; 30 W. R. 143.

(h) *Dickinson v. Dodds*, 2 Ch. Div. 463; 45 L. J. 777, Ch.; 34 L. T. Rep. N. S. 607; 24 W. R. 594.

(i) *Household Fire Company v. Grant*, 4 Ex. Div. 216; 48 L. J. 577, Ex.; 41 L. T. Rep. N. S. 293.

withdrawal of an offer, which must be brought to the knowledge of the party to whom the offer was made before he has posted his letter accepting that offer.(a)

Capacity of Parties.—As to the second requisite, viz., the capacity of the parties to contract, we have already treated of this subject, *ante*, p. 1, *et seq.*; and as their description, see *ante*, p. 51.

The Consideration.—As to this requisite, mere inadequacy of price or consideration for the estate purchased does not alone form a ground for avoiding a contract.(b) And 31 Vict. c. 4 enacts that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest, is to be set aside merely on the ground of inadequacy of price. However, this statute does not oust the jurisdiction of the Court to set aside unreasonable bargains with expectant heirs.(c)

It has also been held that inadequacy of consideration is not sufficient ground for refusing specific performance of a purchase without something more, as improper conduct on the part of the purchaser.(d) However, there is authority to the contrary.(e) And there is authority for stating that the excessive amount of the purchase money, though not attributable to fraud or misrepresentation, is a defence to a purchaser.(f) And indeed it may be said that few contracts will be enforced in equity where the price is wholly unreasonable.(g)

The Court will not enforce an illegal contract.(h)

Terms of the Contract.—As to the fourth requisite, even if the contract be in writing, the terms thereof must be clear and definite, and complete, or the Court will not decree specific performance; as it might otherwise decree performance of that which the parties did not intend; and if the Court were to allow the terms to be supplied by parol evidence that would be letting in the mischief the Statute of Frauds was designed to prevent.(i) Therefore, where an offer was made to take a house for a specified term, and at a certain rent, if put into thorough repair, and stating also that the drawing-room would be required to be handsomely decorated according to the present style, and the offer was accepted, the court dismissed the action on account of the uncertainty in the contract as to the repairs and decorations.(k) But parol evidence may be received

(a) *Henthorn v. Fraser* (1892), 2 Ch. 27; 61 L. J. 373, Ch.; 66 L. T. Rep. N. S. 439; 40 W. R. 433.

(b) *Longmate v. Ledger*, 2 L. T. Rep. N. S. 256; Fry, Sp. Perf. 205, 3rd edit.

(c) *Miller v. Cook*, L. R. 10 Eq. 641; 40 L. J. 11, Ch.; 22 L. T. Rep. N. S. 740; *Aylesford v. Morris*, 8 Ch. App. 484; 42 L. J. 546, Ch.; 21 W. R. 424.

(d) *White v. Damon*, 7 Ves. 30; *Coles v. Trecothick*, 9 Ves. 348.

(e) *Falcke v. Gray*, 4 Drew, 651.

(f) See cases cited Dart's V. & P. 1210, 6th edit.

(g) Sug. V. & P. 273, 14th edit.; Dart, *sup.*; *Falcke v. Gray*, *sup.*

(h) *Sykes v. Beadon*, 11 Ch. Div. 170; Fry, Sp. Perf. 224, 228, 3rd edit.

(i) See Story's Eq., sect. 767; Fry, Sp. Perf. 174, *et seq.*, 3rd edit.

(k) *Taylor v. Portington*, 7 De G. M. & G. 328.

to ascertain the subject-matter of the agreement, that is, to identify the property sold.(a)

Parol Contract.—Although, as we have just seen, the 4th sect. of the Statute of Frauds requires a written contract in the case of realty, there are circumstances which will take a case out of that statute, and the contract will be enforced in an action for specific performance notwithstanding the absence of a written contract, as (1) where the agreement is set out in the statement of claim and is admitted by the defendant in the defence, and he does not insist on the statute as a bar; (2) where he has prevented the agreement from being reduced into writing by fraud; (3) where a clear and definite parol agreement has been partly performed; and (4) where the sale is by the Court.(b)

As to the first exception mentioned, the contract is here enforced notwithstanding the absence of a written agreement because there is little chance of fraud; and as the defendant does not insist on the statute he is deemed to have waived it.(c)

The Court will sometimes grant specific performance of a written contract with a parol variation; however, the most unequivocal proof of the parol variation must be given; and prior to the Judicature Act, 1873, it was in general only allowed to be used by a defendant in resisting specific performance, and not by a plaintiff in seeking it. A plaintiff was, however, allowed to make use of a parol variation where there had been a sufficient part performance of the parol portion; where an omission had occurred by fraud; or where the defendant set up a parol variation and the plaintiff sought performance with such variation.(d)

And since the Judicature Act, 1873, s. 24 (7), it is thought the Court will in a proper case grant a plaintiff specific performance with a parol variation.(e)

As to the second exception, if the agreement be prevented from being reduced into writing by the fraud of one of the parties and be not enforced at the suit of the innocent party, it would be allowing the defendant to avail himself of a fraud, the thing the statute was designed to prevent.(f)

As to the third exception, that is where there has been part performance, the acts relied on as amounting to part performance of the parol agreement must be unequivocal, and in their nature referable to the agreement, and have been done with a view to its performance.(g) Such acts indeed as would after being permitted render non-performance of the

(a) *Shardlow v. Cotterell*, 20 Ch. Div. 90; 51 L. J. 353, Ch.; *Plant v. Bourn* (1897), 2 Ch. 281; 66 L. J. 643, Ch.; 76 L. T. Rep. N. S. 820; 46 W. R. 59, C. A.

(b) *Lester v. Foxcroft*, 1 L. C. Eq. 881; 6th edit.; Fry, Sp. Perf. 262 to 268, 3rd edit.

(c) Story's Eq., sects. 755 to 757; Fry Sp. Perf. 262, 3rd edit.

(d) Story's Eq., sects. 770, 770a; Fry Sp. Perf. 357, *et seq.*, 3rd edit.; *Wollam v. Hearn*, 2 L. C. Eq. 513, 7th edit.; *Smith v. Wheatcroft*, 9 Ch. Div. 223; 39 L. T. Rep. N. S. 103.

(e) Fry, Sp. Perf. 375, 3rd edit.

(f) Story's Eq. sect. 768.

(g) *Gunter v. Halsey*, Amb. 586; *Maddison v. Alderson*, 8 App. Cas. 467, 479; 49 L. T. Rep. N. S. 303; 52 L. J. 737, Ch.; 31 W. R. 820.

agreement by the party charged a fraud.(a) If, therefore, a purchaser is permitted to take possession of the property, and such possession is exclusively referable to the agreement, this amounts to a part performance which will take the case out of the statute; because otherwise the purchaser is a trespasser, and liable to answer as such.(b) So where a tenant is in possession and a verbal agreement is made to grant him a lease for twenty-one years at an increased rent, and he pays a proportion of such rent, this is sufficient to take the case out of the statute.(c)

But as between vendor and purchaser, payment of part of the purchase money, or even of the whole, does not amount to part performance, so as to take a case out of the Statute of Frauds.(d) Nor will delivery of the abstract of title, giving directions for the conveyance, making valuations or admeasurements, or the like acts do so.(e) As to what evidence may be given in support of the parol contract, see Fry, Sp. Perf. 291, 3rd edit.

The doctrine of part performance of a contract taking a case out of the Statute of Frauds was confined by the Court of Equity to suits relating to the sale of interests in land, and its operation has not been extended by the provisions of the Judicature Act, 1873. sect. 24, sub-sects. 4, 7.(f)

As to the fourth exception, that is where the sale is by order of the Court, here the judicial character of the proceedings precludes uncertainty and prevents fraud.(g)

Interests in lands, &c., within the 4th sect. of the Statute of Frauds.

The following have been held to be interests in lands, &c., and require contracts respecting them to be evidenced by a written agreement. An agreement for the sale of the exclusive right to the vesture of land, or the sale of crops, which would not go as emblements to the executors, as mowing grass(h); standing underwood(i); or growing fruit, as apples or pears(k); or an agreement giving a right to shoot over land and take away the game.(l)

But those things which would on the death of the owner of the land go to his executors as emblements, are not it seems within the 4th sect.

(a) Fry, Sp. Perf. 272, 3rd edit.

(b) Story's Eq., sects. 761, 763; *Pain v. Coombs*, 1 D. & J. 34.

(c) *Nunn v. Fabian*, 1 Ch. App. 35; *Miller and Aldworth v. Sharp* (1899), 1 Ch. 622; 80 L. T. Rep. N. S. 77; 68 L. J. 322, Ch.; 47 W. R. 268.

(d) *Hughes v. Morris*, 2 D. M. & G. 356; *Britain v. Rossiter*, 11 Q. B. Div. 123, 131; 48 L. J. 362, Q. B.; 27 W. R. 482.

(e) Story's Eq., sect. 762; Fry, Sp. Perf. 288, 3rd edit.

(f) *Britain v. Rossiter*, sup.; *Maddison v. Alderson*, sup.

(g) Fry, Sp. Perf. 262, 3rd edit. (h) *Carrington v. Roots*, 2 M. & W. 248.

(i) *Scorrell v. Bozall*, 1 Y. & J. 396.

(k) *Rodwell v. Phillips*, 9 M. & W. 501; 11 L. J. 217, Ex.

(l) *Webber v. Lee*, 9 Q. B. Div. 315; 51 L. J. 485, Q. B.; 47 L. T. Rep. N. S. 215; 30 W. R. 866.

as an agreement for the sale of growing crops of potatoes, or corn(a). being produced by labour and industry.

Shares in a railway company, where the Act of Incorporation makes them personal estate, are not within the section(b); nor shares in a mining company worked on the cost-book principle.(c) And it was held that a sale by a tenant to his landlord of the tenant's fixtures was not within either sect. 4 or sect. 17 of the Statute of Frauds.(d)

Although the foregoing interests are not within the 4th sect. of the Statute of Frauds, it must be remembered that by 56 & 57 Vict. c. 71, s. 4, a contract for the sale of any goods of the value of 10*l.*, or upwards, cannot be enforced by action unless the buyer accept part of the goods, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged, or his agent.(e)

And by sect. 62 of 56 & 57 Vict. c. 71, "goods" in sect. 4 includes all chattels personal (other than things in action and money), also emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Therefore, sales of growing crops, or of tenant's fixture are now, if of the value of 10*l.*, within sect. 4 of 56 & 57 Vict. c. 71. See also *post*, tit. "Bills of Sale."

A contract for the purchase of lands may also arise by such lands being compulsorily taken by the promoters of works of a public nature, as by the promoters of a railway company (*ante*, p. 8). But the mere service of a notice to treat by the promoters does not constitute a contract by the landowner for the sale of his land, nor is there, strictly speaking, any contract between the parties until they have come to some definite arrangement as to the terms, or until the value is ascertained by arbitration or by a jury, &c. Therefore, the mere service of the notice without the price being fixed does not, in the event of the death of the landowner before the price is ascertained as above stated, amount to an equitable conversion of the land into money, as between the real and personal representatives of the deceased. But after the landowner agrees to accept the price offered by the promoters, or it is ascertained as above, a conversion takes place.(f) However, where money is paid into Court under sect. 69 of the Land Clauses Consolidation Act, 1845, where the landowner has an estate

(a) *Jones v. Flint*, 10 Ad. & E. 753.

(b) *Bradley v. Houldsworth*, 3 M. & W. 422.

(c) *Watson v. Spratley*, 10 Exch. 222.

(d) *Lee v. Gaskell*, 1 Q. B. Div. 700; 45 L. J. 540, Q. B.; 34 L. T. Rep. N. S. 759; 24 W. R. 824.

(e) The above section is in effect a re-enactment of sect. 17 of the Statute of Frauds, which is repealed.

(f) *Haynes v. Haynes*, 1 Dr. & S. 426; 30 L. J. 578, Ch.; 4 L. T. Rep. N. S. 199; 9 W. R. 497; *Watts v. Watts*, L. R. 17 Eq. 217; *Harding v. Metropolitan Railway Company*, 7 Ch. App. 154; 26 L. T. Rep. N. S. 109; 20 W. R. 321; *et ante*, p. 9.

in fee and is under disability (*ante*, p. 9), the land is not treated as converted.(a)

Still, the notice to treat constitutes a contract binding on the company to the extent of fixing what lands are to be taken.(b) And if they do not proceed with the notice the landowner may compel them to do so by moving for a *mandamus* in the Queen's Bench Division of the High Court.(c).

Effect of a binding Contract.

The effect of a contract binding on the parties thereto is in equity to make the vendor a trustee for the purchaser, who becomes the beneficial owner of the property; and either the vendor or purchaser or their respective representatives may bring an action on such contract in case of breach by the other, and obtain damages; or enforce specific performance thereof in the Chancery Division of the High Court.(d)

Death.—The death of either party, therefore, does not avoid the contract. The heir-at-law or devisee of the purchaser will be entitled to the land purchased, if freehold, and the personal representatives of the vendor will take the purchase money, there being an equitable conversion in each case.(e)

The heir-at-law or devisee of the deceased purchaser cannot now, however, unless the deceased has signified a contrary intention, require the purchase money to be paid out of the personal or other estate of the deceased purchaser, in any case where the vendor has a lien for his unpaid purchase money.(f) But the heir-at-law or devisee is, it seems, entitled to the rents and profits from the death up to the day fixed for completion.(g)

The statute 17 & 18 Vict. c. 113. originally only applied to mortgage debts, and precluded the heir-at-law or devisee of a mortgagor, dying after 31st December, 1854, from calling upon the personal or other real estate of the deceased to discharge the debt, unless the deceased had by his will or deed, or other instrument, signified a contrary intention.

This statute was followed by 30 & 31 Vict. c. 69, which by sect. 1,

(a) *Kelland v. Fulford*, 6 Ch. Div. 491; 25 W. R. 506.

(b) *Dart's V. & P.* 242, 6th edit.; *Haynes v. Haynes*, sup.

(c) *Fry*, Sp. Perf. 58, 3rd edit.; *Dart's V. & P.* 248, 6th edit.; *Harding v. Metropolitan Railway Company*, sup.

(d) *Lysaght v. Edwards*, 2 Ch. Div. 499; 45 L. J. 554, Ch.; 34 L. T. Rep. N. S. 787; *Shaw v. Foster*, L. R. 5, H. L. 321; 42 L. J. 49, Ch.; 27 L. T. Rep. N. S. 281; *Fletcher v. Ashburner*, 1 L. C. Eq. 968, 6th edit.; *Storey's Eq.* sect. 788, *et seq.*; *et post*.

(e) See references in note (d).

(f) 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34; *Re Cockcroft*; *Broadbent v. Groves*, 24 Ch. Div. 94; 52 L. J. 811, Ch.; 49 L. T. Rep. N. S. 497; 32 W. R. 223; *Re Kidd* (1894), 3 Ch. 558; 63 L. J. 855, Ch.; 71 L. T. Rep. N. S. 481; 43 W. R. 51.

(g) *Lumsden v. Fraser*, 12 Sim. 268; 10 L. J. 362, Ch.; *Dart's V. & P.* 298, 6th edit.

provides that in the construction of a will of a person dying after 31st December, 1867, a general direction that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of a contrary intention within 17 & 18 Vict. c. 113. And by sect. 2 it is enacted that in the construction of both the Acts the word "mortgage" shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a *testator*.

It was held that this statute did not apply to lands purchased by a person who died *intestate*.^(a) But by 40 & 41 Vict. c. 34, the 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69 are extended to land purchased by an intestate dying after 31st December, 1877.

This Act also provides that after 31st December, 1877, a contrary intention is not to be deemed to be signified as to a testator by a charge or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

It has been held that the Acts only apply where the vendor has a lien on the estate for his unpaid purchase money, and if this right be excluded^(b), the former law would apply^(c), and under that law if there be a binding contract enforceable against the purchaser at his death, the right of the vendor to put an end to the contract, which is exercised after the purchaser's death, does not affect the right of his devisee or heir to receive the purchase money out of the testator's or intestate's personal estate.^(d)

It was also held that leaseholds for years were not within 17 & 18 Vict. c. 113, because the Act only speaks of the "heir or devisee."^(e) The statute 40 & 41 Vict. c. 34, however, extended 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69 to land of any tenure, as to any testator or intestate dying after 31st December, 1877, which includes leaseholds for years.^(f)

If the vendor dies after a valid contract for sale of the fee simple or other freehold interest descendible to heirs general in any land, his personal representatives can, by virtue of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 4, sub-sects. 1, 2, and 3, convey the land for all the estate and interest vested in the vendor at his death. But such a conveyance does not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate. And this section only applies to cases of death after the commencement of the Act.

Further, by sect. 30 of the Act, trust and mortgage estates of inheritance or limited to the heir as special occupant, vested in any person solely,

(a) *Harding v. Harding*, L. R. 13 Eq. 493; 41 L. J. 523, Ch.; 26 L. T. Rep. N. S. 656.

(b) See hereon, *post*, tit. "Purchase Deeds."

(c) *Re Cockcroft*; *Broadbent v. Groves*, *supra*.

(d) *Whitaker v. Whitaker*, 4 Bro. C. C. 31; *Hudson v. Cook* (1872), L. R. 13 Eq. 417; 41 L. J. 306, Ch.; 26 L. T. Rep. N. S. 180; 20 W. R. 407.

(e) *Soloman v. Soloman*, 10 L. T. Rep. N. S. 54; 12 W. R. 540.

(f) *Drake v. Kershaw*, 37 Ch. Div. 674; 57 L. J. 559, Ch.; 36 W. R. 413; 58 L. T. Rep. N. S. 512.

on his death, devolve upon and become vested in his personal representatives like a chattel real, notwithstanding any testamentary disposition thereof, with power for one or all such representatives to deal therewith.

By 57 & 58 Vict. c. 46, s. 88, the above section (30) is not to apply to land of copyhold or customary tenure vested in the tenant on the court rolls of the manor upon trust, or by way of mortgage. This section replaces sect. 45 of the Copyhold Act of 1887, to the same effect, and on the construction of the latter section it was held that its effect was to repeal s. 30 of the Conveyancing Act of 1881, as to copyholds, so that if a sole trustee of copyholds had died between the commencement of the latter Act and the passing of the Copyhold Act of 1887, the legal estate in the copyholds, which by virtue of sect. 30 had devolved upon his personal representatives, was, on the passing of the Copyhold Act of 1887, divested from them and vested in his customary heir or devisee; but that any disposition of the property made by the personal representatives before the passing of the Copyhold Act of 1887 would be valid.(a)

Sect. 30 of the Conveyancing Act of 1881 does not render sect. 4 of the same Act (*supra*) unnecessary, because under a contract to sell realty the vendor does not become a trustee for the purchaser unless the contract is binding on both parties.(b)

And, as already fully shown, by the Land Transfer Act, 1897, in cases of death after 31 Dec., 1897, where real estate is vested in any person without a right in any other person to take by survivorship, it, notwithstanding any testamentary disposition, devolves upon and becomes vested in his personal representatives as if it were a chattel real. Copyholds requiring admittance of the tenant are, however, excluded (sects. 1, 2, 3, 5; and see fully, *ante*, p. 29, *et seq.*).

Bankruptcy.—The bankruptcy of either party after a valid contract is entered into does not avoid such contract.(c) Yet, although a contract of sale of property to be completed on a certain date, entered into without notice of an available act of bankruptcy by the vendor, is a protected transaction under s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)(d), such protection does not extend to a conveyance or payment made in pursuance of such contract with notice of an available act of bankruptcy committed after the contract has been entered into and before the day fixed for completion. And the purchaser may refuse to complete and recover back a deposit paid on entering into the contract, because the vendor is not in a position at the latter date to give either a good conveyance or a valid receipt for the purchase money.(e)

Further, by the Bankruptcy Act, 1883, s. 55 (1, 4, 5), as amended by

(a) *Re Mills*, 37 Ch. Div. 312; 40 *Id.*, 14; 60 L. T. Rep. N. S. 442; 37 W. R. 81.

(b) *Lysaght v. Edwards*, 2 Ch. Div. 499; 45 L. J. 554. Ch.; 34 L. T. Rep. N. S. 787; and see *Re Colling*, 32 Ch. Div. 333; 55 L. J. 486, Ch.; 54 L. T. Rep. N. S. 809.

(c) *Baldw. Bk.* 199, 7th edit.; *Add. Cont.* 80, 9th edit. (d) See *ante*, p. 35.

(e) *Powell v. Marshall*, 68 L. J. 477, Q. B.; (1899) 1 Q. B. 710; 80 L. T. Rep. N. S. 509, C. A.

the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13, where any part of the property of a bankrupt consists of land of any tenure burdened with onerous covenants, or of unprofitable contracts, &c., the trustee in bankruptcy may, by writing signed by him within twelve months after his first appointment, disclaim the property or contract. But if he does not after a written application by a party interested in the property or contract, within twenty-eight days thereafter (or such extended period as is allowed by the Court), disclaim, he cannot then do so: and as to the contract, he is deemed to have adopted it. And the Court may on the application of any person who is as against the trustee entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance thereof, as to the Court seems equitable, and any damages payable may be proved as a debt under the bankruptcy.

Loss or benefit after contract.—As the purchaser, from the date of a valid contract of sale, becomes in equity as against the vendor the owner of the land, providing a title is shown according to the contract, he must bear any loss or deterioration affecting it after the contract and before completion of the purchase.(a) As if a house contracted to be sold is burned down, even though the vendor may have received the insurance money on a policy of fire insurance effected by him.(b) So on the purchase of a life annuity, or an estate for life, the purchaser must bear any loss arising from the death of the *cestui que vie*.(c)

On the other hand, the purchaser is entitled to any benefit which may accrue to the estate between the contract and the conveyance.(d)

Rents and Profits.—From the date of the contract and up to the time fixed for completion the vendor is, in the absence of special stipulation, entitled to the crops or other ordinary profits of the land; he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time fixed for completion and pending negotiation, he may, it appears, in due course of husbandry, cut coppice, and get in crops, but the net profits will belong to the purchaser. And the inheritance and everything which forms part of it belongs to the purchaser from the date of the contract, so that he is entitled to windfalls and to the produce of ordinary timber cut.(e) However, royalties payable under an existing lease of an open quarry form part of the rents and profits, and not of the inheritance, although the stone taken out is so much of the inheritance taken.(f)

(a) *Harford v. Purrier*, 1 Mad. 532, 538; Fry, Sp. Perf. 420, 422; 3rd edit.; *Lysaght v. Edwards*, 2 Ch. Div. 499, 507, *et supra*.

(b) *Rayner v. Preston*, 18 Ch. Div. 1; 50 L. J. 472, Ch.; 44 L. T. Rep. N. S. 787; 29 W. R. 546; *et ante*, p. 54.

(c) *Kenney v. Wezham*, 6 Mad. 355; Dart's V. & P. 287, 6th edit.

(d) *Harford v. Purrier*, 1 Mad. 539; Dart's V. & P. 286, 6th edit.

(e) Dart's V. & P. 285, 286, 732, 6th edit.; Fry, Sp. Perf. 621, 3rd edit.; *Harford v. Purrier*, *sup*.

(f) *Leppington v. Freeman*, 66 L. T. Rep. N. S. 357; 40 W. R. 348.

Where the contract fixes no time for completion, and the vendor is in possession, then, in the absence of stipulation, the purchaser is entitled to the rents and profits from the time at which he might prudently have taken possession, that is, from the time a good title is shown; and the vendor is entitled to interest on the purchase money from that time.(a)

Remedies for Breach of Contract.

We have already, in preceding pages, partly anticipated this subject, and shown when a contract may be rescinded, when compensation can or cannot be claimed, when the deposit becomes forfeited, and briefly when it may be recovered, and when an action of deceit will lie.

It remains to consider the remedy by either party (or their respective representatives) to a valid contract of sale of land (including leasehold) on breach thereof by the other party (1) by application to the Chancery Division of the High Court for specific performance of the contract(b); or (2) by action in the Queen's Bench Division for damages for the breach of the contract, or for deceit, or by the purchaser to recover his deposit which may be commenced either in the Queen's Bench or Chancery Division.

(1) *Specific Performance*.—If the existence or validity of the contract is not disputed specific performance thereof may, in effect, be obtained by summons at chambers under the Vendor and Purchaser Act, 1874, but if the existence or validity of the contract(c) be disputed an action must be commenced by writ of summons.

By the above Act (37 & 38 Vict. c. 78), sect. 9, a vendor or purchaser of real or leasehold estate or their representatives respectively may apply in a summary way to a judge of the Chancery Division in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, not being a question affecting the *existence or validity* of the contract, and the judge may make such order as he thinks just, including the payment of costs of and incident to the application.

In proceedings under this section the parties are in the same position as under a reference as to title in an action for specific performance.(d) So it seems the deposit may be recovered with interest(e); but not damages for loss occasioned to the purchaser by delay in completion of the purchase.(f) However, the validity of the notice to rescind may be

(a) Fry, Sp. Perf. 621, 3rd edit.; *Re Pigott and Great Western Railway Company*, 18 Ch. Div. 146; 44 L. T. Rep. N. S. 792; Dart's V. & P. 711, 6th edit.; *Binks v. Lord Rokeby*, 2 Sw. 226; *et ante*, p. 44.

(b) Dart's V. & P. 1114, *et seq.*, 6th edit.

(c) See *ante*, pp. 59 to 63.

(d) *Re Burroughs*, 5 Ch. Div. 601; 46 L. J. 528, Ch.; 36 L. T. Rep. N. S. 778; 25 W. R. 520.

(e) *Re Smith and Stott's Contract*, 48 L. T. Rep. N. S. 512; 31 W. R. 411; 29 Ch. Div. 1009, n.; but see *Re Davis and Cavey*, 40 Ch. Div. 601; 58 L. J. 143, Ch.; 60 L. T. Rep. N. S. 100; 37 W. R. 217.

(f) *Re Wilson and Stevens' Contract* (1894) 3 Ch. 546; 69 L. J. 863, Ch.; 71 L. T. Rep. N. S. 388; 43 W. R. 23.

decided on summons.(a) But not any matter which does not concern the purchaser, as the destination of the purchase money.(b)

Although a vendor has a mere pecuniary demand against a purchaser who refuses to complete which may be enforced by action in the Queen's Bench Division of the High Court, yet upon the principle of affording mutual remedies, he may sue for specific performance in the Chancery Division of the High Court.(c) And where he so sues he is not bound by the title as shown by him at the time of the issue of the writ of summons, but has the opportunity of making out a better title under a reference to chambers thereon; and if he can show a good title at any time before the date of the master's certificate, it will entitle him to judgment, presuming time be not of the essence of the contract.(d)

Subject to express stipulation, the title to the property must be made out free from reasonable doubt; that is, the vendor must show a marketable title, or the purchaser will be entitled to repudiate the bargain. A marketable title is one which, as far as its antecedents are concerned, may at all times and under all ordinary circumstances be forced upon an unwilling purchaser.(e)

The doubt that may prevent the Court from compelling the purchaser to accept a title may be one of law or of fact; and as to law it may be connected with the general law of the realm, or with the construction of particular instruments; and as to fact, it may be in reference to facts appearing on the title, or to facts extrinsic to it.(f) The Court would it seems consider the title doubtful in the following cases: (1) where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable; for the Court will not compel a purchaser to buy a law-suit.(g) (2) Where there has been a decision of a Court of *co-ordinate* jurisdiction adverse to the title, though the Court thinks that decision wrong.(h) (3) Where the title rests on a presumption of fact of such a kind that if the question of fact were before a jury, it would be the duty of the judge not to give a clear direction in favour of the fact, but to leave it to the jury to draw their own conclusion from the evidence.(i)

If it appears that the vendor is neither able to convey the property himself, nor can compel a conveyance of it from any other person, the

(a) *Re Jackson and Woodburn's Contract*, 37 Ch. Div. 44; 57 L. J. 243, Ch.; 36 W. R. 396.

(b) *Re Tippet and Newbould's Contract*, 37 Ch. Div. 444; 58 L. T. Rep. N. S. 754; 36 W. R. 597.

(c) *Dart's V. & P.* 1107, 6th edit.; Fry, Sp. Perf. 32, 3rd edit.

(d) *Langford v. Pitt*, 2 P. W. 630; Fry, Sp. Perf. 607, 3rd edit.; *Dart's V. & P.* 487, 1227, 6th edit.

(e) *Pyrke v. Waddingham*, 10 Hare 8; recognised in *Palmer v. Locke*, 18 Ch. Div. 381; and see Fry, Sp. Perf. 401, 406, 3rd edit.

(f) Fry, Sp. Perf. 408, 3rd edit.

(g) *Sharp v. Adcock*, 4 Rus. 374; Fry, Sp. Perf. 408, 3rd edit.

(h) *Mullings v. Trinder*, L. R. 10 Eq. 449, 454; 39 L. J. 833, Ch.; Fry, Sp. Perf. 409, 3rd edit.

(i) Fry, *sup.*

purchaser may rescind the contract, and is not bound to wait to see whether the vendor can induce some third party to join in making good the title to the property.(a)

And a purchaser will not be compelled to take an equitable title unaccompanied by the legal estate, unless the sale is made under a decree of the Court; and even then only when the Court sees that the legal estate can be got in; as where it is outstanding in an infant, from whom it may readily be got in.(b)

However, it has been held by the Court of Appeal that a possessory title arising under the Statute of Limitations can be forced upon a purchaser. But this must be verified like any other fact.(c)

If the vendor as plaintiff fails, upon an inquiry as to title directed by the Court, to make out a good title, the Court may order him to return the deposit with interest, and to pay the costs of the action. The Court may also order that these sums are to be a lien on the estate in favour of the purchaser.(d)

If, however, he succeeds the Court may order payment of the purchase money within a given time, and declare that he is entitled to a lien on the estate for such purchase money, with interest thereon until payment, also for costs, and give him liberty to apply to enforce such lien in default of payment.(e) On an application for such purpose the Court will generally order a sale of the property, and if a proper case be made out, also the appointment of a receiver pending such sale.(f)

The Court will not grant specific performance unless the party seeking relief comes promptly, and as soon as the nature of the case will permit.(g)

It is no defence to a suit for specific performance that there is inserted, in the contract a penalty in case of non-performance.(h)

After judgment for specific performance of a contract concerning land, the Court may declare that any parties to the action are trustees of the land, &c., and may make a vesting order relating to the rights of parties, or may appoint some person to convey the property, which has the same effect as if such parties respectively had executed a conveyance to the effect intended by the order.(i)

And not only will the contract be enforced for and against the parties

(a) *Farrar v. Nash*, 35 Beav. 171; *Bellamy v. Debenham*, (1891) 1 Ch. 412; 60 L. J. 166, Ch.; 64 L. T. Rep. N. S. 478; 39 W. R. 257.

(b) *Freeland v. Pearson*, L. R. 7 Eq. 246, 249; *Dart's V. & P.* 1335, 6th edit.

(c) *Games v. Bonner*, 33 W. R. 66; 54 L. J. 517, Ch.

(d) *Turner v. Marriott*, L. R. 3 Eq. 744; 15 L. T. Rep. N. S. 607; *Fry, Sp. Perf.* 612, 3rd edit.

(e) See *Dart's V. & P.* 1248, 6th edit., 3 *Seton on Decrees* 1001, 5th edit.

(f) See *Fry, Sp. Perf.* 534, 3rd edit.; *Munns v. Isle of Wight Railway Company* 5 Ch. App. 414; 2 L. C. Eq. 949, 7th edit.

(g) *Eads v. Williams*, 4 De G. M. & G. 674; 24 L. J. 581, Ch.; *Levy v. Stogden* (1899) 1 Ch. 5; 68 L. J. 19 Ch.; 79 L. T. Rep. N. S. 364, C. A.

(h) *Howard v. Hopkins*, 2 Atk. 371; *Dart's V. & P.* 1183, 6th edit.; 2 L. C. Eq. 259, 7th edit.

(i) 56 & 57 Vict. c. 53, ss. 31-33; 47 & 48 Vict. c. 61, s. 14.

thereto or their respective representatives, but also for and against the trustee in bankruptcy, subject, however, to the trustee's right of disclaimer, and the power of the non-bankrupt party to apply to the Court to rescind the contract.(a)

So a tenant for life of settled land may contract to sell, &c., the settled land, and it is binding on and enures for the benefit of the settled estate, and may be enforced, as stated *ante*, p. 22.

So the Court may decree against a tenant in tail himself specific performance of a contract for disentailment entered into by him, as stated *ante*, p. 23.

And we have shown(b) that a tenant in tail in possession, even when restrained by statute from barring the entail, save where the entailed land was purchased by money provided by Parliament as the reward for public services, has the powers of a tenant for life of settled lands. As has also a tenant in tail after possibility of issue extinct.

As to infants, lunatics, and married women, see *ante*, p. 11, *et seq.*

By the Land Transfer Act, 1875, sect. 93, provision is made for the specific performance of a contract relating to registered land, as will be shown in a subsequent(c) chapter.

(2.) *Action for Damages*.—Where there is default on the part of the vendor the purchaser may, as a general rule, either rescind the contract of sale, and sue for a return of his deposit, if any(d), or may affirm the contract, and sue for damages for its breach, also claiming a return of the deposit, if any.(e)

However, in the case of *Bain v. Fothergill*,(f) it was decided by the House of Lords that upon a contract for the sale and purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the purchaser cannot recover compensation in damages for the loss of his bargain, but only the expenses he has incurred. He can only obtain damages by action of deceit, and, as already stated, in such an action actual fraud must be proved.(g) But the above decision is not to be extended.(h)

Under a claim for expenses incurred in such a case the purchaser can, in the absence of stipulation to the contrary, recover the cost of entering into and stamping a valid agreement; investigating the title; of comparing the abstract with the title deeds; also interest on his deposit; and he may recover the deposit itself as money had and received.(i)

Upon default of the purchaser, the vendor, or if he be dead, his personal representatives, can sue the purchaser for damages sustained by breach of

(a) See *ante*, p. 68; Fry, *Sp. Perf.* 439, 3rd edit.

(b) *Ante*, p. 23.

(c) See *post*, tit. "Land Transfer Acts and Rules."

(d) See Dart's *V. & P.* 1071, 6th edit.

(e) Dart's *V. & P.* 1072, 6th edit.

(f) *L. R.* 7 Ho. L. 158; 43 *L. J.* 243, Ex.; 31 *L. T. N. S.* 389; 23 *W. R.* 261.

(g) See *ante*, p. 42.

(h) *Day v. Singleton* (1899) 2 Ch. 320; 68 *L. J.* 593, Ch.

(i) Dart's *V. & P.* 1076, 6th edit.; 1 David. *Conv.* 473 to 475, 5th edit.; *Hodges v. Lichfield*, 1 Scott, 448; 1 Bing. N. C. 492.

the contract.(a) But the vendor is entitled to recover only such damages as he has actually sustained by breach of the contract.(b)

And if the purchaser has been let into possession and the bargain goes off through defect of title in the vendor, the purchaser cannot be sued for use and occupation during the time the contract was pending; at least not if he has paid the purchase money.(c) If, however, after the contract is clearly abandoned the purchaser retains possession, he will be liable in respect of such subsequent possession.(d)

The party proceeding, whether vendor or purchaser, must (unless discharged therefrom by the other) perform his liabilities before he seeks to enforce his rights under the contract. So that on the one hand the purchaser before suing should as a general rule tender the sum, if any, due in respect of the purchase money, as also the conveyance, unless the vendor has neglected to furnish or verify his abstract of title, &c. On the other hand, if the vendor sues upon the agreement, he must have shown a good title, and have been ready and willing to execute a conveyance in the terms of the contract.(e)

It must be remembered, however, that the Chancery Division of the High Court can award damages. The statute 21 & 22 Vict. c. 27, provided that where the Court could grant an injunction, or specific performance, it might award damages to the party injured, either in addition to or substitution for such remedy. And the Judicature Act, 1873, s. 24 (7), provides that the High Court and the Court of Appeal are to grant all such remedies whatsoever as any of the parties to the cause or matter may be entitled to in respect of every legal or equitable claim brought forward, so that all matters in controversy may be completely settled without multiplicity of proceedings.' The 46 & 47 Vict. c. 49 expressly repeals 21 & 22 Vict. c. 27, but the jurisdiction under it is preserved by sect. 5 of the Repealing Act. And independently of this, since the Judicature Act each Division of the High Court has ample jurisdiction to award damages.(f)

It seems that when a vendor is plaintiff he cannot claim to have the contract rescinded and damages for its breach in the same action.(g)

Stamps on Agreements.

By 54 & 55 Vict. c. 39, s. 22, and Schedule, it is provided that an agreement under hand only, and not otherwise specially charged with duty, whether only evidence of a contract or obligatory upon the parties

(a) Dart's V. & P. 1084, 6th edit.

(b) *Laird v. Pim*, 7 M. & W. 478; Chit. Cont. 331, 13th edit.; Dart, *sup.*

(c) Dart's V. & P. 1085, 6th edit.; *Kirtland v. Pounsett*, 2 Taunt. 145; Add. Cont. 616, 9th edit.

(d) Dart, *sup.*; *Howard v. Shaw*, 8 M. & W. 118; Add., *sup.*

(e) Dart's V. & P. 1086, 6th edit.; Chit. Cont. 333, 13th edit.

(f) *Sayers v. Collier*, 28 Ch. Div. 103; 54 L. J. 1, Ch.; 51 L. T. Rep. N. S. 723; 33 W. R. 92, C. A.

(g) *Henty v. Schroder*, 12 Ch. Div. 666; *Jeffery v. Stewart*, 80 L. T. Rep. N. S. 17.

from its being a written instrument, is to be charged with a duty of 6*d*. However, by sect. 59, an agreement under seal or under hand only for the sale of any equitable estate or interest in any property, or for the sale of any estate or interest in any property except lands, or tenements, or property situate abroad, and certain other personal interests, is to be charged with the same *ad valorem* duty as if it were an actual conveyance on sale of the estate, interest, or property agreed to be sold. And the conveyance itself is to be stamped with a denoting stamp. But if the contract is stamped with the duty of 6*d*. (or the fixed duty of 10*s*. where required) it is to be deemed duly stamped for the mere purpose of enforcing specific performance or recovering damages for breach thereof.(a)

Certain agreements are by the schedule to the Act exempt from duty, the most important in regard to conveyancing being where the subject matter of the agreement is not of the value of 5*l*.

The purchaser of several lots at the same auction at different prices is considered to have entered into a separate agreement for each lot, and the agreement must bear as many stamps as there are lots.(b) If the agreement consists of several letters it is sufficient to stamp one of them.(c)

The Abstract of Title.

The property having been sold, the next step is to prepare the abstract of title, if this has not already been done. We will now, therefore, briefly notice the points to be attended to in the preparation of the abstract of title.

The length of time the title is to be carried back will depend upon whether there is a condition or stipulation on the point, or whether the contract is an open one. If there is a stipulation, then the title will commence with the document specified thereby to be the root or origin of the title. If the contract is an open one, that is, without any condition or stipulation as to title, the title to freeholds or copyholds must, as a rule, be carried back to the legal time for the commencement of an abstract.

Freeholds.—In the absence of stipulation to the contrary, the title to freehold lands and tenements must be carried back for forty years anterior to the date of the contract of sale.(d)

As to the best document with which to commence an abstract of title, it may be stated that a purchase deed or a mortgage deed is a good instrument with which to commence the abstract. A mortgage deed

(a) See also sects. 54 & 62; *West London Syndicate v. Inland Revenue* (1898) 2 Q. B. 507; 67 L. J. 956, Ch.; 79 L. T. Rep. N. S. 289, C. A.; *Farmer v. Inland Revenue* (1898), 2 Q. B. 141; 67 L. J. 775, Q. B.

(b) *James v. Shore*, 1 Stark. 426.

(c) *Grant v. Maddox*, 15 M. & W. 737; 15 L. J. 104 Ex.

(d) See 37 & 38 Vict. c. 78, ss. 1, 2; 44 & 45 Vict. c. 41, s. 3; 45 & 46 Vict. c. 39, s. 4.

conveying the fee is almost of equal validity with a purchase deed as a root of title, since the title would probably have been well investigated before the execution of the mortgage, and the purchaser would have the benefit of the absolute covenants.(a) As a voluntary conveyance might prior to 56 & 57 Vict. c. 21 (see *post*, tit. "Settlements") have been revoked or avoided by a subsequent conveyance for value, a purchaser was not bound to accept a title commencing with such an instrument.(b) So it is objectionable as being liable to be set aside if the settlor becomes bankrupt within two or ten years after making the settlement, under the circumstances set out in 46 & 47 Vict. c. 52, s. 47, sub-sect. 1. However, this section does not make the settlement void *ab initio*, but voidable only, and it cannot be set aside as against a *bona fide* purchaser for value of the property comprised therein without notice.(c)

Subject to stipulation, and to the effect of the Conveyancing Act, 1881, a will is not considered an eligible root of title, even in the case of a specific devise, and especially in the case of a general devise. If the vendor sells as general devisee the conveyance to the testator should be abstracted, or if there be no such deed evidence must be furnished, as also if he be specific devisee, by old leases, receipts for rent, &c., showing that the testator was in possession of the estate, or in receipt of the rents, at the date of his will, and at his decease, if the will was *made* before 1838. But if made after this period proof need only be given of possession at the time of his death.(d)

The vendor must, at his own cost, furnish the purchaser with a complete abstract of title for the statutory period, or the period fixed by the contract of sale.(e)

Advowsons.—In the case of an advowson, the title must, it is said, in the absence of stipulation to the contrary, be carried back 100 years; as the 3 & 4 Will. 4, c. 27, enacts that no action shall be brought to enforce a right to present to any ecclesiastical benefice as patron thereof, but within three incumbencies adverse to the right of presentation, or sixty years (sect. 30); and in no case can an action be brought after the expiration of 100 years from the time at which the clerk obtained possession adversely to the title of the claimant, &c. (sect. 33).

However, by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), sect. 3 (repealing 13 & 14 Vict. c. 21, s. 4 to the same effect) the term "land" in any statute passed after 1850 is (*inter alia*) to include "tenements and hereditaments"; therefore if it includes an advowson, the Vendor

(a) Dart's V. & P. 337, *et seq.*, 6th edit.; 1 Byth. & Jarm. Conv. 56, 4th edit.

(b) *Re Marsh and Lord Granville*, 24 Ch. Div. 11; 53 L. J. 81 Ch.; 48 L. T. Rep. N. S. 471; 31 W. R. 845, C. A.

(c) *Re Carter & Kenderdines Cont.*, 66 L. J. 408, Ch.; 76 L. T. Rep. N. S. 476; 45 W. R. 484; (1897) 1 Ch. 776, disapproving of *Re Briggs and Spicer* (1891) 2 Ch. 127; 60 L. J. 514, Ch.; 64 L. T. Rep. N. S. 187.

(d) See Dart's V. & P. 338, 6th edit.; Wolst. & T. Conv. 2, 6th edit.; *Re Banister*, 12 Ch. Div. 131, 142; 48 L. J. 837, Ch.

(e) *Re Johnson and Tustin*, 30 Ch. Div. 42; 54 L. J. 889, Ch.; 53 L. T. Rep. N. S. 281, C. A.

and Purchaser Act, 1874, s. 2, would apply, and a forty years' title be sufficient.(a)

A list of presentations should accompany the abstract of title for the purpose of showing that acts of ownership have been exercised in conformity with the right to present.(b)

The purchase of an advowson never included the right to the next presentation, unless the church was full at the time of the purchase, whether bought by a layman or by a clerk.(c)

The next presentation, however, might formerly have been severed from the advowson; but a clergyman was prohibited by 12 Anne, c. 12, from purchasing a next presentation(d) with a view to presenting himself.

And by the Benefices Act, 1898, 61 & 62 Vict. c. 48 (operating on and after 1st January, 1899), a transfer of a right of patronage of a benefice is not to be valid unless (1) it is duly registered in the registry of the diocese within one month of its date, or within such extended time as the bishop may allow; and (2) it transfers the *whole interest* of the transferor in the right (except as in the Act provided); and (3) more than twelve months have elapsed since the last institution or admission to the benefice (61 & 62 Vict. c. 48, sects. 1, 14). No next presentation can now therefore be severed and sold.

"Benefice" comprehends all rectories, with cure of souls, vicarages, perpetual curacies, &c., with certain specified exceptions (sect. 13).

Any agreement for the exercise of such a right of patronage in favour or on the nomination of any particular person, and any agreement on the transfer for the retransfer of the right; or for postponing payment of any part of the consideration until a vacancy, &c.; or for the resignation of a benefice in favour of any person is invalid (sect. 1, sub-sect. 3, and see also sub-sect. 5).

"Transfer" includes any conveyance or assurance passing or creating any legal or equitable interest *inter vivos*, and any agreement for any such conveyance or assurance; but not (1) a transmission on marriage, death, or bankruptcy, or otherwise by operation of law; nor (2) a transfer on the appointment of a new trustee where no beneficial interest passes (sect. 1, sub-sect. 6); and nothing in the section is to prevent the reservation or limitation in a family settlement of a life interest to the settlor, or in a mortgage the reservation of a right of redemption (sub-sect. 7).

The application for registration must be signed by the applicant, and be supported by his statutory declaration of the truth of the particulars set forth in it (Benefices Rules, 1898, r. 4).

By sect. 1 of the Act, it is unlawful to offer for sale by public auction any right of patronage, save an advowson to be sold in conjunction with any manor, or with an estate in land of not less than 100 acres situate in

(a) See *Jones v. Watts*, 43 Ch. Div. 574; 38 W. R. 725; but see Dart's V. & P. 334, 336, n., 6th edit.; Will. R. P. 521, 523, 16th edit.

(b) Dart's V. & P. 334, 6th edit.

(c) 31 Eliz. c. 6; *Fox v. Bishop of Chester*, L. C. C. 135; Will. R. P. 346, 16th edit.

(d) See hereon *Walsh v. Bishop of Lincoln*, L. R. 10 C. P. 518.

the parish in which the benefice is situate, or in an adjoining parish, and belonging to the same owner as the advowson, and the person who acts in contravention of this, or who bids at any such sale is to be liable, on summary conviction to a fine not exceeding 100*l.* (sect. 1, sub-sect. 2). And every benefice with cure of souls which is donative is to be presentative (sect. 12). An advowson was said to be donative when the patron's deed of donation alone was sufficient to complete the incumbent's title.(a)

Mining Shares.—On a sale of a share in a mining company, the purchaser cannot require a title to be shown to the mines themselves, but he is entitled to some reasonable evidence of the vendor's right to sell.(b)

Allotments.—Upon the sale of lands allotted under an Inclosure Act, the abstract down to the award must be that of the title to the lands in respect of which the allotment was made.(c) But by 3 & 4 Vict. c. 31, s. 1, all awards made in pursuance of that Act, or of the Inclosure Act, 6 & 7 Will. 4, c. 115, are to be conclusive evidence that all the provisions of those Acts have been complied with, and all necessary consents given; and no other evidence than the award is to be requisite to establish the title. And by the Inclosure Act of 1845 (8 & 9 Vict. c. 118) sects. 104, 105, when an award made thereunder is confirmed, such confirmation is to be conclusive evidence that all the directions in the Act in relation to the award, and to every allotment, exchange, &c., therein set forth, have been obeyed and performed, and the award is to be unimpeachable for mistake, the want of notices, &c.; and every allotment, exchange, &c., set forth in the award is to be binding and conclusive on all persons. However, notwithstanding this, if the award is made without jurisdiction, it is not binding.(d)

Exchanges.—Formerly where lands were taken in exchange at common law, and then sold, the practice was to furnish an abstract of title both to the lands given and taken in exchange, down to the time of the exchange, and the single title afterwards.(e) But legislation has seemingly rendered this double title unnecessary. The 8 & 9 Vict. c. 106, provides that an exchange of any tenements or hereditaments made by deed shall not imply any condition in law (sect. 4), which previously arose, engendering a right of re-entry in case of eviction.(f) And now an exchange of lands may be made under the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), without any conveyance. It is effected by an order under the seal of the Board of Agriculture, on written application to the Board; which order is good and valid in law and cannot be impeached by reason of any infirmity of estate or defect of title.(g) As to an exchange of settled land, see *ante*, pp. 22, 23.

(a) Will. R. P. 843, 13th edit.

(b) Dart's V. & P. 332, 6th edit.; Sug. V. & P. 376, 14th edit.; 1 Byth. & Jarm. 78, 4th edit.

(c) Dart's V. & P. 326, 6th edit.

(d) *Jacomb v. Turner* (1892), 1 Q. B. 47.

(e) Dart's V. & P. 326, 328, 6th edit.

(f) 1 Steph. Com. 488, 12th edit.

(g) See sect. 147; see also 52 & 53 Vict. c. 30, ss. 2, 7, 10, Sch.

Tithes.—In the absence of stipulation, in the title to tithe held under a grant from the Crown, there should be set out in the abstract the original grant, and then, omitting intermediate instruments, a good sixty, or if the Vendor and Purchaser Act, 1874, applies (see *ante*, p. 75), a good forty years title.(a)

Reversionary Interests.—In the case of a reversionary interest, the abstract should, in the absence of stipulation, and subject to the Conveyancing Act, 1881, show its creation and subsequent dealings therewith for forty years, prior to the contract of sale.(b)

Leaseholds.—In the case of leaseholds for years, in the absence of stipulation, the title will commence with the lease itself, whatever its date, followed by any subsequent dealings therewith for forty years prior to the contract of sale.(c) We have already (*ante*, pp. 57, 58) dealt with the statutes and cases hereon, and shall again have occasion to refer to them.

On the sale of renewable leaseholds where the lease is expressed to be granted in consideration of the surrender of the prior lease, the title to the surrendered lease should be set out.(d)

Copyholds.—If the property be of copyhold tenure, then, in the absence of stipulation, copies of the entries on the Court rolls of manor affecting the property for forty years anterior to the contract of sale must be set out in the abstract of title.(e) But by 44 & 45 Vict. c. 41, where copyholds have been converted into freeholds by enfranchisement a purchaser thereof cannot call for the title to make the enfranchisement (sect. 3, sub-sect. 2).

Descent.—Where a title depends upon a descent a duly authenticated pedigree should accompany the abstract.

Mode of abstracting.—The various documents should be abstracted according to the priority of their respective dates; but where there are two documents of the same date, relating to the same property, they should be abstracted according to the order in which they may be presumed to have been executed, as when one deed conveys property and another deed of the same date declares the trusts thereof. Here the deed of conveyance should be abstracted first.(f) The Court can, however, inquire which deed was executed first.(g)

All documents affecting the property (except expired leases) should, subject to the Conveyancing Act, 1881, s. 3 (3), be abstracted as far as the title is to be carried back(h), otherwise, if any are concealed

(a) Dart's V. & P. 336, and note, 6th edit., *et ante*, p. 75.

(b) Dart's V. & P. 335, 6th edit.

(c) *Frend v. Buckley*, L. R. 5 Q. B. 213; *Williams v. Sprago* (1893), W. N. 100.

(d) *Hodgkinson v. Cooper*, 9 Beav. 304; Dart's V. & P. 332, 6th edit.

(e) See Dart's V. & P. 334, 6th edit.; *et post*, tit. "Copyholds."

(f) Sug. V. & P. 407, 14th edit.; 1 Byth. & Jarm. Conv. 81, 4th edit.

(g) *Gartside v. Silkstone Coal Company*, 21 Ch. Div. 762.

(h) 1 David. Conv. 436, 5th edit.; 1 Byth. & Jarm. Conv. 79, 4th edit. Sug., *sup*; *Palmer v. Locke*, 18 Ch. Div. 381; 51 L. J. 124, Ch.

fraudulently, both the vendor and his solicitor are guilty of a misdemeanour.(a).

It seems that where an equitable mortgage by deposit of deeds accompanied by a memorandum has been paid off, it need not be mentioned in the abstract(b); but where it is merely intended to pay it off before completion, it would seem advisable, considering the last cited statutes, to so mention it(c); a learned writer, however, contends to the contrary.(d)

Any judgments, crown debts, executions, extents, *lis pendens*, &c., which affect the property sold, as against a purchaser, should be mentioned in the abstract.(e)

The amount of stamp duty impressed on the various deeds, &c., should be stated in the margin of the abstract immediately after the date.

If a deed has been abstracted, and is recited in a subsequent deed, it is merely necessary to say, "reciting the before abstracted indenture of the day of , 18 ," giving the date.

As a general rule, the recitals in a document made the root of a title should be abstract fully(f); but 44 & 45 Vict. c. 41, s. 3 (3), precludes the purchaser from calling for the production, &c., of the documents recited, as will be shown more fully subsequently.

The testatum must show concisely the consideration, and if it is required to be paid in particular manner, it should be abstracted fully. The granting clause should be given fully, and if a conveyance abstracted is made by the direction of a particular person, &c., the abstract should show this.(g)

Parcels are abstracted fully from the first abstracted document; but, if no alteration or addition has been made to them by subsequent instruments abstracted, it will be sufficient to refer to them as "the before abstracted premises." Any variation in the description in any subsequent deeds should be noticed.

Exceptions and reservations should be set out fully.(h)

If there are several habendum clauses in one deed, each should be abstracted.

Trusts that have arisen, or powers that have been executed, must be abstracted fully.

The usual covenants for title may be abstracted briefly; but special covenants should be abstracted fully. But as the Conveyancing Act, 1881, sect. 7, implies covenants for title if proper words are used in the granting clause, this clause should be fully abstracted.

The fact of the execution of deeds, &c., should be stated, and if executed under a power, fully, and indorsed receipts. &c., noticed.

(a) 22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8; *et ante*, p. 42.

(b) Dart's V. & P. 342, 343, 6th. edit.

(c) See *Drummond v. Tracey*, John. 608, 612.

(d) Dart, *sup.*

(e) 1 Prid. Conv. 132, 17th edit.; 1 Byth. & Jarm. 78, 4th edit.

(f) Dart's V. & P. 340, 6th edit.; 1 David. Conv. 437, 5th edit.

(g) 1 Byth. & Jarm. Conv. 84, 4th edit.

(h) 1 Byth & Jarm. 85, 4th edit.

Wills, or more usually probates thereof, are generally abstracted more fully than deeds. And if lands devised by a will lie in one of the register counties and the will has been registered, this fact should be stated.

Matters of fact such as births, deaths, and marriages, and the certificates thereof are set out in the abstract in the order in which they occur.

When the property sold consists of lands of different tenures, as where part is freehold and part copyhold, a purchaser should be furnished with separate abstracts of each distinct species of property.(a)

However, by the 44 & 45 Vict. c. 41, s. 3, sub-ss. 7, 9, 10, on a sale of property in lots, made after the commencement of the Act, a purchaser of two or more lots, held wholly or partly under the same title, has no right to more than one abstract of the common title, except at his own expense, unless a contrary intention is expressed in the contract of sale.

Proceedings in bankruptcy should be set out rather fully as the property of a bankrupt after adjudication passes to and vests in the trustee on his appointment, and the title of the trustee relates back to the Act of Bankruptcy on which the adjudication is made(b), as already detailed.

The draft abstract having been prepared, a fair copy thereof must be made on brief paper and sent to the solicitor for the purchaser, or to the purchaser himself at the address given by him if he has no solicitor. A memorandum of the time of delivery of the abstract should be made in case it should be necessary at any time to prove the date of delivery.

Abstract perfect, when.—It has already (*ante*, p. 46) been shown when an abstract of title is said to be “perfect” for the purpose of stipulation as to time. In the stricter sense of the term, it is perfect when it shows a perfect title; that is when it shows that the vendor is either himself competent to convey to, or can procure to be vested in, the purchaser, the legal and equitable estates in the property free from incumbrances.(c) Therefore, an abstract is technically perfect when it shows a good equitable title and power to get in the legal estate.(d)

Production of Title Deeds for Examination.

The purchaser's solicitor will, in due course, obtain an appointment for the purpose of comparing the abstract with the title deeds and documents. As these are generally in the custody of the solicitor for the vendor the examination and comparison take place at his office. However, the vendor may produce the deeds and documents in his possession for the purpose of examination with the abstract of title, (1) either at his own known residence, or (2) upon or near the estate, or (3) in London; for in the latter case the examination can be made by the London agents of the country solicitors.(e)

(a) 1 Hughes' Pr. Conv. 109.

(b) See 46 & 47 Vict. c. 52, ss. 5, 43, 54; *et ante*, p. 35.

(c) Dart's V. & P. 321, 6th edit.

(d) *Camberwell, &c., Society v. Holloway*, 13 Ch. Div. 754, 768; 49 L. J. 361, Ch.; 28 W. R. 222.

(e) Dart's V. & P. 470, 6th edit.

If the deeds be produced at any of these places, the costs of the examination and the expenses of the journeys, &c., incidental thereto must be borne by the purchaser. If not so produced, the rule was, that all extra expenses occasioned thereby were, in the absence of stipulation to the contrary in the contract or conditions of sale, to be borne by the vendor.(a) By the 44 & 45 Vict. c. 41, s. 3 (6), however, it is now enacted that on a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court-rolls, deeds, wills, probates, letters of administration, and other documents, *not* in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any such documents as aforesaid not in the vendor's possession, if any such production, inspection, journey, &c., is required by a purchaser for verification of the abstract, or for any other purpose, are to be borne by the purchaser requiring them. And where the vendor retains possession of any document the expenses of making a copy of it, attested or unattested, required by a purchaser, are to be borne by such purchaser.

Under this sub-section a vendor is bound at his own expense to furnish to the purchaser a proper abstract of title, either for the statutory period of forty years, or for such other period as may be stated in the contract of sale. Therefore, under an open contract the vendor must bear the expense of procuring and making an abstract of any deed forming part of the forty years' title, although such deed is not in his possession.(b)

But under the sub-section, when the vendor has delivered such an abstract as above specified, the purchaser, in the absence of stipulation, must bear the expense of searching for, and of the production for the purpose of verification of, the documents set out in the abstract not in the vendor's possession, not even excepting the deed which is the root of the vendor's title.(c)

And, as will be shown more fully subsequently, recitals of facts in documents as to *land* twenty years old are evidence unless proved to be inaccurate.(d) And recitals of documents as to *any property* dated prior to the legal or stipulated time for commencement of the abstract (see *ante*, p. 74), are to be taken as correct, and production is not to be required.(e)

Sect. 3 of 44 & 45 Vict. c. 41 only applies to sales made after the commencement of the Act, and only so far as there is no stipulation to the contrary in the contract of sale (sub-sects. 9, 10).

(a) Dart, 471.

(b) *Re Johnson and Tustin*, 30 Ch. Div. 42; 54 L. J. 889, Ch. 53 L. T. Rep. N. S. 281; 33 W. R. 737; *Re Moody and Yates*, 30 Ch. Div. 344; 54 L. J. 886, Ch.; 33 W. R. 758.

(c) *Re Willet and Argenti*, 60 L. T. Rep. N. S. 735; *Re Stuart and Olivant*, (1896) 2 Ch. 329; 74 L. T. Rep. N. S. 450; 65 L. J. 576, Ch.; 44 W. R. 610.

(d) 37 & 38 Vict. c. 78, s. 2.

(e) 44 & 45 Vict. c. 41, s. 3, sub-sect. 3.

Requisitions on the Title.

The abstract having been compared with the title deeds, &c., the solicitor for the vendor will, within the time appointed for that purpose, receive from the purchaser's solicitor requisitions on the title (considered *post*, tit. "Purchases") which the vendor's solicitor must answer. If the title is a complicated one, it may be advisable to lay the requisitions, with a copy of the conditions of sale, &c., and the abstract, before counsel for him to advise thereon. In answering the requisitions, it is usual to write the answers opposite to each requisition in the space or column left for that purpose by the purchaser's solicitor in preparing the requisitions.

The Deed of Conveyance, &c.

The requisitions having been disposed of, the vendor's solicitor will receive from the purchaser's solicitor the draft conveyance for perusal and approval. In perusing the draft conveyance the vendor's solicitor must ascertain that the recitals therein are correct, and that the vendor is not made to enter into covenants, either by express stipulation, or by implication under the 44 & 45 Vict. c. 41, s. 7, which he cannot be called upon to give.

Formerly, a vendor beneficially interested in the purchase money, could only be required to give qualified covenants extending to his own acts, which were, (1) that he had good right to convey; (2) for quiet enjoyment; (3) free from incumbrances created by himself or any person claiming under him; and (4) for further assurance at the cost of the purchaser. Where, however, the vendor took the estate by descent, or derived his title through a will, his covenants were extended so as to include the acts of his ancestor or testator. By these covenants the heirs of the vendor were always expressly bound.^(a)

Trustees who have no beneficial interest in the property merely covenant that they have respectively done no act to incumber the premises.^(b) A tenant for life joining trustees in a conveyance of the trust property must enter into covenants for title, express or implied, confined, however, to his interest, and not extending to the reversion.^(c)

Under the 44 & 45 Vict. c. 41, s. 7, covenants for title are not required, for on stating in the deed the character in which a person conveys, the proper covenant by him is incorporated. And by sects. 58 and 59, the heirs, &c., are included though not mentioned. However, we shall speak more fully of covenants hereafter.

The draft conveyance having been approved by the vendor's solicitor, he makes a fair copy thereof for his own use, and returns the original draft to the solicitor for the purchaser, who has it engrossed, and then sends the draft and engrossment to the vendor's solicitor for examination.

(a) Will. Real Pro. 447, 448, 13th edit.; 1 David. Conv. 94, 5th edit.

(b) Dart's V. & P. 94, 146, 6th edit.

(c) Dart's V. & P. 620, 6th edit.; *Re Sawyer and Baring's Contract*, 51 L. T. Rep. N. S. 356; 53 L. J. 1104; 33 W. R. 26.

The purchaser's solicitor next obtains an appointment to complete, which takes place at the office of the vendor's solicitor, unless the property be mortgaged, in which case the completion must be at the office of the mortgagee's solicitor.

If any interest is to be paid in addition to the purchase-money, the amount must be calculated, and on payment of this and the remainder of the purchase-money, the vendor executes the conveyance, and the title deeds are handed over to the purchaser. The points of practice involved on the completion of a purchase will, however, be found more fully detailed (*post*) under the tit. "Purchases."

Registered Land.

As to what the abstract should contain, and for forms of transfer, and the practice on completion when land has been registered under the Land Transfer Acts and Rules, see *post* that title.

CHAPTER III.

PURCHASES.

General Remarks.

A SOLICITOR may be consulted by a client either before or after a purchase of real estate has been made.

If a solicitor accompanies his client to an auction room, he must bear in mind that a bidding may be retracted at any time before the lot is actually knocked down. At least this is so if there be no condition to the contrary, and it is doubtful if such a condition could be enforced.(a)

Also that the printed particulars and conditions of sale cannot, as a general rule, be altered or contradicted by parol at the sale. The exception to the rule is that such evidence may be admitted in equity on behalf of a defendant in an action.(b)

An agreement between two parties not to bid against each other is legal, even when the sale is by order of the Court.(c)

When the sale is concluded the purchaser is required to sign a short memorandum or agreement placed at the foot of the conditions acknowledging himself to be the purchaser of a particular property, or lot or lots, as sales by auction of lands, &c., are within the Statute of Frauds.(d) Usually the auctioneer, as agent for the vendor, does not offer to sign a reciprocal agreement for the vendor, whereby the purchaser is bound, but not the vendor.

The client may, however, have already entered into an agreement to purchase real or leasehold estate, either at a public auction or by private treaty. In the latter case the agreement will most probably be evidenced either by an informal agreement, or by letters passing between the parties. In the former event the particulars and conditions of sale must be perused, and in the latter, the agreement of purchase, or the letters, and it must be ascertained if a binding agreement is entered into.

Many of the points affecting purchasers' contracts have already been

(a) Dart's V. & P. 139, 209, 6th edit.

(b) Sug. Conc. V. & P. 12, 113; Dart's V. & P. 123, 6th edit.; *et ante*, p. 62.

(c) *Re Carew's Estate*, 26 B. 187; 28 L. J. 218, Ch.; 7 W. R. 81; Dart's V. & P. 121, 6th edit.

(d) See 29 Car. 2, c. 3, s. 4; Dart's V. & P. 227, 6th edit.; *et ante*, p. 59.

considered in previous pages : As the capacity of the parties to contract ; their rights and liabilities under the particulars and conditions of sale, including a purchaser's right to set aside a bargain on the ground of concealment, misdescription, or misrepresentation ; and his right to compensation ; of the requisites of a binding contract of sale and purchase, and the effect thereof ; and the remedies for breach of the contract. Other matters affecting the rights and liabilities of purchasers remain to be noticed under this heading.

Where there is a right to avoid a bargain on the ground of misrepresentation or misdescription by the vendor, the right should be exercised at once, and the purchaser should not go on dealing with the property as if he considered the contract still subsisting, unless the delay is occasioned at the express request of the vendor in order to enable him to cure the misrepresentation or misdescription.(a)

Although a vendor is bound to inform the purchaser of *latent* defects in the property, a purchaser is not bound to inform the vendor of any *latent* advantage therein. If the purchaser, therefore, knew of a mine on the estate of which he was in treaty, he would not be bound to disclose that circumstance to the vendor, although the purchaser was aware that the vendor was ignorant of it.(b) But the purchaser is bound to observe good faith in all he says or does with a view to the contract, and must abstain from all deceit ; but no deceit can be implied from his mere silence.(c)

Of Notice.

This is a convenient place to speak of the doctrine of notice.

Notice may be either actual or constructive, the effect, however, being the same. *Actual* notice may be either written or verbal ; and it seems that it should, when it depends upon oral communication, be given by a person interested in the property, and during the course of the treaty.(d)

But a learned writer remarks that the latter statement should be cautiously acted on in practice.(e) *Constructive* notice is said to be no more than evidence of notice, the presumption of which is so violent that the Court will not even allow of its being controverted.(f) However, the writer above mentioned, in commenting on this, states that reported decisions show that constructive notice has often been held to exist in the absence of any idea by the Court of the existence of actual personal knowledge.(g)

(a) *Tibbets v. Boulter*, 73 L. T. Rep. N. S. 535.

(b) *Dart's V. & P.* 118, 120, 6th edit.

(c) *Coaks v. Boswell*, 11 App. Cas. 232, 235 ; 55 L. J. 761, Ch. ; 55 L. T. Rep. N. S. 32 ; 33 W. R. 376.

(d) *Sug. V. & P.* 755, 14th. edit. ; *Barnhardt v. Greenshields*, 9 Moo. P.C. 18.

(e) *Dart's V. & P.* 967, 6th edit. ; see also *Lloyd v. Banks*, 3 Ch. App. 488.

(f) *Sug. V. & P.* 755, 14th edit.

(g) *Dart's V. & P.* 969, 6th edit. ; see also note to *Le Neve v. Le Neve*, 2 L. C. Eq. 201, 202, 7th edit.

Constructive notice seems to be reduced to two classes : the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others ; and the second comprises cases where the purchaser has purposely abstained from making inquiries, or has been guilty of such negligence in not availing himself of the means of acquiring knowledge, as if permitted might be a cloak for fraud.(a)

Whatever is sufficient to put a party on inquiry is good notice ; that is when anyone has sufficient information to lead him to a fact, he will be deemed to have knowledge of it.(b)

The means of knowledge by which anyone is to be affected with notice, must be understood to be means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself.(c)

As a general rule notice of the land contracted for being in the occupation of a person other than the vendor is notice to a purchaser that the person in possession has some interest in the land, and the purchaser is therefore bound either to inquire what that interest is, or to give effect to it whatever it may be. On this principle a purchaser has been held to be bound by all the equities which a tenant could enforce against the vendor(d) ; which include an option for renewal of the tenancy.(e)

This, however, must be taken with some qualification, for it does not apply while the contract is still incomplete, therefore, where the conditions of sale of a public-house merely stated it was in the occupation of a tenant, and a brewer agreed to buy it, intending to use it for the sale of his beer ; but afterwards discovered that it was under lease to another brewer for an unexpired term of eight years, it was held that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and could not be compelled to complete the contract.(f)

Again, if a purchaser or lessee has notice of a deed forming part of the chain of title of his vendor or lessor, he is deemed to have constructive notice of the contents of such deed. And he is not protected from the consequences of not looking at the deed even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title.(g)

(a) *Jones v. Smith*, 1 Hare, 43 ; *Kettlewell v. Watson*, 21 Ch. Div. 685, 704 *Bailey v. Barnes* (1894), 1 Ch. 25 ; 63 L. J. 73, Ch. ; 69 L. T. Rep. N. S. 542 42 W. R. 66, C. A.

(b) 2 L. C. Eq. 46, 6th edit. ; 262, 7th edit.

(c) *Broadbent v. Barlow*, 30 L. J. 569, Ch. ; 4 L. T. Rep. N. S. 193 ; *Bailey v. Barnes*, *sup.*

(d) *Dart's V. & P.* 975, 6th edit. ; 2 L. C. Eq. 63, 6th edit. ; *Cavander v. Bulteel*, 9 Ch. App. 79 ; 43 L. J. 370, Ch. ; 22 W. R. 177.

(e) *Lewis v. Stevenson*, 67 L. J. 296, Q. B. ; 78 L. T. Rep. N. S. 165.

(f) *Caballero v. Henty*, 9 Ch. App. 447 ; 30 L. T. Rep. N. S. 314 ; 43 L. J. 635, Ch. ; 22 W. R. 446.

(g) *Patman v. Harland*, 17 Ch. Div. 353 ; 50 L. J. 642, Ch. ; 44 L. T. Rep. N. S. 728 ; 29 W. R. 707.

And although the Vendor and Purchaser Act, 1874, enacts that under a contract to grant or assign a term of years whether derived out of a freehold or leasehold estate the intended lessee or assign shall not be entitled to call for the title to the *freehold* (sect. 2, sub-sect. 1), yet this section has not altered the rule that a lessee has constructive notice of his lessor's title; a lessee is now in the same position with regard to notice as if he had before the Act stipulated not to inquire into the lessor's title.(a)

The statute 44 & 45 Vict. c. 41, s. 3, in the absence of stipulation to the contrary, prevents the assignee of an under lease from calling for the title to the leasehold reversion; and sect. 13, in the absence of such stipulation prevents an intended lessee of a term to be derived out of a leasehold interest, from calling for the title to that reversion. But neither of these sections prevent the intended assignee or lessee from calling for the lease under which the intended assignor or lessor holds.(b) Therefore the decision in *Patman v. Harland* (*sup.*) would apply to the contents of that instrument.(c)

Although notice of a lease is, as a rule, constructive notice of the covenants of the lease, yet this only applies to usual covenants, and the intending purchaser of an existing lease, or person agreeing to take an underlease, has not constructive notice of unusually onerous covenants, unless before the agreement he had a fair opportunity of ascertaining for himself the terms of the onerous covenants, whether the sale be by public auction or private contract.(d)

Constructive notice may be imputed from the fact that sufficient inquiry has not been made in respect to title deeds. This point will, however, be discussed, *post*, tit. "Mortgages."

As to a purchaser having notice of unpaid debts when purchasing real or leasehold estate from an executor, see *ante*, pp. 26, 31.

Notice to the counsel, solicitor, or agent is constructive notice to the client or principal, if such notice was acquired in the same transaction, or prior to 45 & 46 Vict. c. 39, s. 3 (ii.), where one transaction is closely followed by and connected with another, under circumstances that satisfy the Court that the notice must have been remembered. For it would be a breach of duty or confidence in the counsel, solicitor, or agent not to inform the client or principal.(e)

But, notice to the solicitor is not notice to the client, when the person giving the information knows, or has good reason to believe, that it will

(a) *Patman v. Harland*, *sup.*

(b) *Gosling v. Woolf* (1893), 1 Q. B. 39; 68 L. T. Rep. N. S. 89; 41 W. R. 106; and see *ante*, pp. 57, 58.

(c) Wolst. & B. Conv. 20, 8th edit.

(d) *Hyde v. Warden*, 3 Ex. Div. 72; *Reeve v. Berridge*, 20 Q. B. Div. 523; 58 L. T. Rep. N. S. 836; 57 L. J. 285, Q. B. 36 W. R. 517; *Bishop v. Taylor*, 60 L. J. 556, Q. B.; 64 L. T. Rep. N. S. 529; 39 W. R. 542; *Re White and Smith's Contract* (1896), 1 Ch. 637; 74 L. T. Rep. N. S. 376.

(e) 2 Dart's V. & P. 967, 987, 6th edit.; Story's Eq. ss. 399, 408.

not be communicated to the client.(a) Nor is a client to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal.(b)

The Conveyancing Act. 1882 (45 & 46 Vict. c. 39), clearly defines how far a purchaser is to be affected with notice.

This Act enacts that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made, as ought reasonably to have been made by him ; or (ii) in the same transaction, with respect to which a question of notice to him arises, it has come to the knowledge of his counsel, solicitor, or agent as such, or would have come to their knowledge if they had made such inquiries and inspections, as they ought reasonably to have made : (sect. 3, sub-sect. 1.)

This section, is not, however, to exempt a purchaser from liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately, which may be enforced as if the section had not been enacted : (sub-sect. 2). But he is not to be affected by notice in any case where he would not have been so affected if the section had not been enacted : (sub-sect. 3).

The expression "ought reasonably," in sub-sect. 1, means ought as a matter of prudence, having regard to what is usually done by prudent men of business in similar circumstances.(c)

Section 3 (ii.), it will be observed, confines the notice obtained through the purchaser's counsel, solicitor, or agent to the same transaction with respect to which the notice to the purchaser arises. Therefore, so much of the former law, as extended the doctrine of constructive notice, so as to impute it when the transactions were closely connected one with another, is no longer in force.(d)

Purchaser includes a lessee, or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for property : (sect. 1, sub-sect. 4 (ii).)

In the absence of evidence to the contrary there is a legal presumption that a man knows the contents of a deed which he executes (e) ; but a person who has attested the execution of a deed will not, it seems, be affected with notice of the contents of the deed, for a witness is not, in practice, privy to the contents of such deed.(f)

(a) *Sharp v. Foy*, 4 Ch. App. 35, 41 ; 17 W. R. 65.

(b) *Kennedy v. Green*, 3 Myl. & K. 699 ; *Cave v. Cave*, 15 Ch. Div. 639 ; 49 L. J. 505, Ch. ; 42 L. T. Rep. N. S. 730 ; 28 W. R. 798.

(c) *Bailey v. Barnes* (1894), 1 Ch. 25 ; 63 L. J. 73, Ch. ; 69 L. T. Rep. N. S. 542 : 42 W. R. 66 ; *et ante*, p. 86.

(d) *Re Cousins*, 31 Ch. Div. 671, 676, 677 ; 55 L. J. 662, Ch. ; 54 L. T. Rep. N. S. 376 ; 34 W. R. 393.

(e) *Per Jessell, M.R.*, in *Re Cooper*, L. R. 20 Ch. Div. 611, 628.

(f) *Sug. Cone. V.* 614 ; *Dart's V. & P.* 985, 6th edit.

Registration of an equitable mortgage of lands in Middlesex is not of itself constructive notice to a subsequent legal mortgagee, so as to take from him his legal advantages.(a) But by the Yorkshire Registries Act, 1884, as to lands in Yorkshire, all assurances entitled to be registered are to have priority according to the date of registration, and not according to date or execution; and no one is to lose such priority merely in consequence of his having actual or constructive notice, except in cases of actual fraud. And tacking is prohibited in this county.(b)

The effect of notice of judgments, &c., will be stated in subsequent pages.

As to the effect of notice to trustees, see *post*, tit. "Mortgages."

Rights of Way, Light, Air, Water, &c.

The intending purchaser should make inquiry as to probable defects in or easements over the estate, for if patent, he cannot, it seems, obtain any relief, although the defect was not stated in the particulars of sale.(c)

Ways and Roads.—Where a meadow was sold without any mention of a footway over it, the purchaser was, nevertheless held to his bargain, as it was not a *latent* defect. Had he used ordinary diligence he would have discovered the easement; therefore, the maxim *caveat emptor* was held to apply.(d) Where neither the vendor nor the purchaser knew of the existence of a right of way over part of the land sold until after the contract was entered into, it was held to be a latent defect.(e)

Where there is any reason to suppose that the cost of paving and sewerage in respect of the property, apportioned by a vestry or district authority under the Metropolitan Local Management Acts, 1856 and 1862 (18 & 19 Vict. c. 120), s. 105, and (25 & 26 Vict. c. 102), s. 77, or incurred by a local authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, remain unpaid, inquiry should be made, as these expenses are by the Acts made payable by the owners of the land, present or future, which, in effect, make the expenses a charge on the land.(f)

They are not, however, land charges within the meaning of the Land Charges Registration Act, 1888 (51 & 52 Vict. c. 51), so as to require

(a) *Morecock v. Dickens*, Amb. 678.

(b) 47 & 48 Vict. c. 54, ss. 14, 16; 48 & 49 Vict. c. 26, s. 5; *Battison v. Hobson* (1896), 2 Ch. 403; 65 L. J. 695, Ch. 74 L. T. Rep. N. S. 689.

(c) *Ante*, p. 41; Fry, Sp. Perf. 556, 557, 3rd edit.

(d) *Wild v. Gibson*, 1 H. L. Cas. 605; Sug. V. & P. 328, 14th edit.; but see *ante*, p. 41.

(e) *Ashburner v. Sewell* (1891), 3 Ch. 405; 60 L. J. 784, Ch.; 65 L. T. Rep. N. S. 524.

(f) *Plumstead Board of Works v. Ingoldby*, L. R. 8 Ex. 63, 174; *Re Bettsworth and Richer*, 37 Ch. Div. 535; 57 L. J. 749, Ch.; 58 L. T. Rep. N. S. 796; 36 W. R. 544.

registration under it.(a) The inquiry must, therefore, be made to the vestry or local authority.(b)

The right to an easement, not of necessity, may be extinguished by an union of ownership of the dominant and servient tenements. Thus, if the owner of estate A. has a right of way or access of light over estate B., and both these estates come into the hands of the same owner, and both estates are co-equal and perdurable, then the right (not being of necessity) is extinguished by this union of ownership of the dominant and servient tenement. But if the estates are not perdurable, the right is only suspended, and revives on the severance of ownership of the dominant and servient tenement.(c)

Light.—Where a house, having grounds attached, is purchased by A., an adjacent owner may open a new window in his house completely overlooking the grounds of A., however much it may interfere with A.'s privacy; and he has no legal remedy to prevent this, but he may build on his own land and thereby obstruct the new lights.(d)

If A. builds a house on his own land, and then sells and conveys the house to B., and reserves the remaining land, A. impliedly grants to B. with the house the right to light over the land, and can neither himself obstruct the lights of the house nor grant to anyone claiming under him the right to do so; and either may be restrained by injunction.(e)

And if A. sell the house and land simultaneously to different buyers, there is an implied reservation of the right to light for the house, which right may be protected by injunction.(f) The rule is the same where the simultaneous alienation is by will.(g)

Where the owner of the land builds a house thereon with lights overlooking land adjoining belonging to him, and after the house has been erected more than twenty years he sells the garden land to a purchaser, without express reservation of lights, the purchaser may erect any buildings he pleases on the land bought, although they interfere with the lights of the vendor's house; for there is no covenant implied that a right to light is reserved by the vendor, or granted by the purchaser.(h)

(a) *Reg. v. Office of Land Registry*, 24 Q. B. Div. 178; 59 L. J. 113, Q. B.; 62 L. T. Rep. N. S. 117; 38 W. R. 236. But as to land charges under the Land Transfer Acts, see *post*, that Title.

(b) *Dart's V. & P.* 524, 6th edit.; *Gover on Title*, 112, 2nd edit.

(c) *Sury v. Pigot*, Tud. L. C. Conv. 752, 804, 4th edit.; *Godd. Eas.* 534, 536, 5th edit.; *Dart's V. & P.* 403, 404, 6th edit.; *Simper v. Foley*, 2 John. & H. 555; 5 L. T. Rep. N. S. 669.

(d) *Tapling v. Jones*, 11 H. L. Cas. 290, 305; 12 L. T. Rep. N. S. 555; 34 L. J. 342, C. P.; *Latham, Wind. Lights*, 126, 128, 324; *Godd. Eas.* 54, 5th edit.

(e) *Dart's V. & P.* 408, 409, 6th edit.; *Robinson v. Grave*, 21 W. R. 569; *Godd. Eas.* 270, 5th edit.

(f) *Allen v. Taylor*, 16 Ch. Div. 355; 50 L. J. 178, Ch.; *Dart, sup.*; *Broomfield v. Williams*, 66 L. J. 305, Ch.

(g) *Phillips v. Low* (1892) 1 Ch. 47; 61 L. J. 44, Ch.; 65 L. T. Rep. N. S. 552.

(h) *White v. Bass*, 7 H. & N. 722; 5 L. T. Rep. N. S. 843; 31 L. J. 283, Ex.; *Curriers Company v. Corbett*, 2 Dr. & Sm. 358; 12 L. T. Rep. N. S. 169; *Beddington v. Atlee*, 35 Ch. Div. 317; 56 L. J. 655, Ch.

The right to light (*sup.*), air (*infra*), and support (*post*, p. 93) are often termed natural rights as distinguished from an easement in its strict sense.(a)

Air.—As distinguished from an obstruction of light it is only in very rare and special cases involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of *diminution* of air.(b) Thus there is no natural right of uninterrupted access of air to a windmill;(c) or to the chimneys of a building;(d) nor can such a right be acquired as an easement by prescription where the air does not come through any definite channel, but over the general unlimited surface of the alleged servient tenement.(e) It was recently held that a right of ventilation to a cellar through a shaft cut through adjoining land may be acquired as an easement, or on the presumption of a lost grant.(f)

Nuisances.—An intending purchaser should see that there are no nuisances on the property; for if one exists, although the property be in lease, and the nuisance cannot be removed by a purchaser of the property, he would nevertheless render himself liable for it. But if the nuisance were created by the occupier after the purchase, the purchaser would not be responsible, still the purchaser should not renew the tenancy or let the property with the nuisance upon it.(g)

Drains.—As to drains, where the owner of two or more adjoining houses, sells, or conveys one of the houses, the purchaser of such house will be entitled to the benefit of all the drains from his house, and will be subject to all the drains necessary to be used for the enjoyment of the adjoining houses, although there is no express reservation as to drains, for the purchaser bought the house such as it was.(h) Inquiry should, therefore, be made on this point.

There is a conflict of decisions as to whether a drain passing through private ground and conveying the drainage of two or more houses belonging to different owners, is a sewer within the Public Health Acts, 1875 and 1890, and repairable by the local authority.(i)

Mines.—As to mines, if the surface of land be granted reserving the mines, with power to work them, the grantee will have a *prima facie*

(a) *Godd. Eas.* 2, 3, 116, 118, 5th edit.

(b) Per Lord Selbourne in *City of London Brewery Company v. Tennant*, 9 Ch. App., at p. 221.

(c) *Webb v. Bird*, 13 C. B. N. S. 841, 844; 31 L. J. 335, C. P.

(d) *Bryant v. Lefever*, 4 C. P. Div. 172; 48 L. J. 380, Q. B.

(e) *Bryant v. Lefever*, *sup.*; *Harris v. De Pinna*, 33 Ch. Div. 238; 54 L. J. Rep. N. S. 38, 770; *Chastey v. Ackland* (1895), 2 Ch. 389; 64 L. J. 523, Ch.

(f) *Bass v. Gregory*, 25 Q. B. Div. 481; 59 L. J. 574, Q. B.

(g) *Dart's V. & P.* 1045, 6th edit.; *Sug. V. & P.* 58, 14 edit.; *Woodf. L. & T.* 774, 16th edit.

(h) *Sug. V. & P. sup.*

(i) See *Hill v. Hair* (1895) 1 Q. B. 906; 64 L. J. 164, M. C.; *Seal v. Merthyr Tydfil Urban Council* (1897) 2 Q. B. 543; 67 L. J. 37 Q. B.; and *Travis v. Uttley* (1894) 1 Q. B. 233; 63 L. J. 48, M. C.

right to the support of the subjacent strata. So, if the minerals are let or granted, and the surface retained, the grantor's right to support will in like manner remain.(a)

By the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), sect. 77, a railway company is not entitled to mines or minerals under land purchased by them, except such parts thereof as are necessary to be dug or carried away or used in the construction of the works, unless the same have been expressly purchased; and all such mines, save as aforesaid, are to be deemed to be excepted out of the conveyance. By sects. 78 and 79 a mine owner, &c., desirous of working mines or minerals under the railway or within the prescribed distance, if any, and if not, forty yards therefrom, must give the railway company thirty days' written notice of his intention; and if the company is willing to make compensation for the mines, he is prohibited from working the mines; but otherwise he may work them in a proper and usual manner. A railway company is not, therefore, as to support, in the position of an ordinary purchaser, as the above statute has created a specific law for such matters, regulating the rights of the company and the mine owner.(b)

The Waterworks Clauses Act (10 Vict. c. 17), sects. 18, 22, and 23, contain similar provisions to the above as to mines and minerals, in regard to waterworks companies.

Further remarks as to mines and minerals passing under a conveyance of land will be found, *post*, tit. "Purchase Deeds."

Fences, Walls, &c.—Where the boundary between two adjoining pieces of land is marked by a hedge and a ditch, and the ditch is artificial, the ordinary rule is that the ditch belongs to the owner of the hedge, but if the ditch is not artificial, but a natural water course, it is doubtful if the presumption applies. For no one making a ditch can cut into his neighbour's land, and he must throw the soil he digs out on to his own land, and often he plants a hedge upon it.(c)

Sometimes adjoining tenements are divided by a "party-wall," which usually means (1) a wall of which two adjoining owners are tenants in common; but (2) the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners; or (3) it may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; and (4) the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety. Therefore, where adjoining property is so divided the rights of the adjoining owners in respect to such wall depend upon the

(a) *Davis v. Treharne*, 6 App. Cas. 460; 50 L. J. 665, Q. B.; 29 W. R. 869; *Westmoreland (Earl), v. New Sharlston Colliery Company*, 79 L. T. Rep. N. S. 716: (1899), 2 Ch. 264; Dart's V. & P. 421, 422, 6th edit.

(b) *Great Western Railway Company v. Bennett*, L. R. 2 H. L. Cas. 27.

(c) *Vowles v. Miller*, 3 Taunt. 138; *Marshall v. Taylor* (1895) 1 Ch. 641, 647: 72 L. T. Rep. N. S. 670.

character of their ownership or interest in it.(a) In the absence of evidence of the ownership of a party-wall, it seems a jury is entitled to find that it belongs to the adjoining proprietors as tenants in common.(b)

Water.—As to water, an owner of land may sink a well on his land and divert by pumps and steam engines the underground water which would otherwise percolate the soil, and flow into the river, although there is on the banks of the river a mill which has been worked by the river for more than sixty years; for the right to flowing water, *ex jure naturæ*, only prevails where it has a defined course.(c) Still a land owner cannot use his right to water percolating underground strata, so as to draw off the water flowing in a defined surface channel on his neighbour's land.(d)

But where a land owner by draining his land causes a subsidence of the land of an adjoining landowner, he is not liable for the injury thus occasioned, for the doctrine of right of support does not extend to subterraneous water.(e)

But if in drawing off the water, sand or silt is also removed and damage to the adjoining landowner's houses is occasioned, an actionable wrong is committed.(f) And no one has a right to use his own land in such a way as to be a nuisance to his neighbour; therefore if he puts foul matter on his land, or into his own well, he must take care that it does not escape so as to poison water which his neighbour has a right to use.(g)

Lateral support.—Where ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as from the land; and this right of support can be claimed under the Prescription Act (2 & 3 Will. 4, c. 71).(h)

And where two dwelling-houses were built independently, each at the extremity of the owner's land, and having lateral support from the soil on which the other rested, and so continued for more than twenty years when one of them was openly and without concealment converted into a factory which threw much more lateral pressure than before upon the soil under the adjoining house. And more than twenty years after the

(a) *Watson v. Gray*, 14 Ch. Div. 192; 49 L. J. 243, Ch.; 28 W. R. 438.

(b) *Standard Bank of British South Africa v. Stokes*, 9 Ch. Div. 68, 71; 47 L. J. 554, Ch.

(c) *Chasemore v. Richards*, 7 H. L. Cas. 349; 29 L. J. 81, Ex.

(d) *Grand Junction Canal Company v. Shugar*, 6 Ch. App. 483; Godd. Eas. 94, 5th edit.

(e) *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; 38 L. J. 126, Ex.; 20 L. T. Rep. N. S. 578; 17 W. R. 806; Dart's V. & P. 422, 6th edit; Godd. Eas. 63, 129, 5th edit.

(f) *Jordeson v. Sutton, &c., Gas Company*, 68 L. J. 457, Ch.; 80 L. T. Rep. N. S. 815; (1899) 2 Ch. 217, C. A.

(g) *Ballard v. Tomlinson*, 29 Ch. Div. 115; 54 L. J. 454, Ch.; 52 L. T. Rep. N. S. 942; 33 W. R. 533, C. A.

(h) *Lemaitre v. Davis*, 19 Ch. Div. 281; 51 L. J. 173, Ch.; 46 L. T. Rep. N. S. 407; 30 W. R. 360; *Dalton v. Angus*, 6 App. Cas. 740; 50 L. J. 689, Q. B.; 44 L. T. Rep. N. S. 844; 30 W. R. 191; Godd. Eas. 316, 5th edit.

conversion the owner of the adjoining house pulled it down and excavated the soil under it for several feet, which deprived the factory stack of the lateral support of the adjoining soil and caused it to sink and fall down, bringing with it most of the factory. And it was held that the owner of the factory had, by the twenty years enjoyment, acquired a right of support for his factory and could sue the adjoining owner for the injury.(a)

Although an owner has a right that his own land shall not be disturbed by the removal of the support naturally rendered by the subjacent and adjacent soil, this right does not extend to overburdening his own land by buildings newly erected.(b)

Possession.—Until it is clear that a good title can be made to the property, the solicitor, acting on behalf of a purchaser, should not allow his client to take possession, as such a measure would, in some cases, be deemed an acceptance of the title.(c) If a contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver.(d) If, however, possession is taken in accordance with the terms of the contract, it will not, as a rule, amount to a waiver of the purchaser's right to a good title.(e) An act which amounts to a waiver of the purchaser's right to reject a defective title is not necessarily a waiver of his right to compensation for the defect.(f)

If a purchaser takes possession, except under a special agreement, and then rejects the title, he may be ejected by the vendor, as he thereby becomes tenant at will to the vendor, and he cannot at law have any allowance for improvements or repairs; nor will equity afford him any relief unless there has been fraud on the part of the vendor.(g)

If the contract be rescinded in equity on the ground of fraud, the Court will, in general, make an allowance to the purchaser for substantial improvements and repairs. If, however, the sale is set aside at the suit of the purchaser, the allowance will only extend to such repairs as are necessary for the preservation of the property, made before discovery of the matter on which the relief is sought, and will not extend to improve-

(a) *Dalton v. Angus*, sup.

(b) *Godd. Eas.* 61, *et seq.*, 5th edit.; and see *Corporation of Birmingham v. Allen*. 6 Ch. Div. 284; 46 L. J. 673, Ch.; 25 W. R. 810.

(c) *Dart's V. & P.* 499, 503, 6th edit.

(d) *In re Gloag and Miller's Contract*, 23 Ch. Div. 320; 48 L. T. Rep. N. S. 628; 31 W. R. 601.

(e) *Dart's V. & P.* 499, 6th edit.; *Sug. V. & P.* 343, 14th edit.; *Bolton v. London School Board*, 7 Ch. Div. 766; 47 L. J. 461, Ch.

(f) *Dart's V. & P.* 503, 6th edit.; *Sug. V. & P.* 343, 14th edit.

(g) *Dart's V. & P.* 503, 6th edit.; 36 & 37 Vict. c. 66, s. 25 (11).

ments.(a) On the other hand, if the title is proved defective an action for use and occupation will not lie against the purchaser for the time during which he has been in possession under the contract; but if he retains possession after the contract is abandoned he is liable for such subsequent possession.(b)

The Abstract of Title, &c.

We have already (*ante*, p. 78) stated what documents of title, &c., should be set out in the abstract of title to the property agreed to be sold, and the mode in which they should be set out. It remains now to show what are the duties of the purchaser's solicitor on receipt of the abstract.

When the abstract of title has been received from the vendor's solicitor a memorandum of the date of such receipt should be made with a view to the period allowed for sending in requisitions on the title.

As to whether the abstract should be first perused or first compared with the title deeds must depend upon circumstances. The purchaser's solicitor may, if he thinks fit, compare the abstract with the title deeds before investigating the title, and if there is a binding contract he can recover the costs thereof, if the title proves bad. For an early comparison often saves expense afterwards.(c)

If the abstract be apparently defective it is advisable to compare it with the title deeds before perusal.(d)

Where a condition provides for the delivery of the abstract of title at a certain time (*ante*, p. 46), and the vendor fails to deliver a perfect abstract within that time, he cannot hold the purchaser bound to send in his requisitions within the time limited for that purpose.(e)

And as before shown, "delivery of an abstract" means in regard to time, delivery of an abstract as perfect as the vendor could furnish at the time of delivery; and consequently an objection may be raised after the prescribed time, which arises out of any document called for before the expiration of that time; or where the abstract does not raise an objection.(f)

Where, however, the purchaser receives the abstract after the time fixed by a condition for its delivery, he waives the condition.(g)

Enactments as to Title.—Under an open contract the purchaser can require that the abstract shall commence with some document forty years old, the 37 & 38 Vict. c. 78, s. 1, enacting that, on a contract of sale of land, subject to any stipulation to the contrary, forty years is to be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the period formerly required, except in cases where an earlier title than sixty years might previously be required.(h)

(a) Dart's V. & P. 504, 6th edit.

(b) Dart's V. & P. 504, 6th edit.

(c) Sug. V. & P. 362, 363, 14th edit.; Dart's V. & P. 348, 472, 6th edit.

(d) Sug. V. & P. 411, 14th edit.; Dart's V. & P. 348, 6th edit.

(e) *Upperton v. Nicolson*, 6 Ch. App. 436; 40 L. J. 401, Ch.; 25 L. T. Rep. N. S. 4; 14 W. R. 733.

(f) See *ante*, p. 46.

(g) Dart's V. & P. 490, 6th. edit.

(h) As in the case of an advowson; as to which, see *ante*, p. 75.

And by sects. 1 and 2, rule 2 of this Act, on a contract for the sale of land, (a) recitals, statements of facts, and parties, in deeds and documents twenty years old at the date of the contract, are, unless proved to be inaccurate, to be taken as sufficient evidence of the truth of such facts, &c., in the absence of stipulation to the contrary in such contract.

And by the 44 & 45 Vict. c. 41, s. 3, sub-s. 3, 10, on a sale of *any property* after the operation of the Act, a purchaser cannot require the production, or any abstract or copy, of any deed, will, or other document made before the time prescribed by law (forty years), or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted; nor can he make any requisition, objection, or inquiry with respect to such deed, will, or other document, or the title prior to that time, although such deed, will, or other document, or prior title, is recited, covenanted to be produced, or noticed. And he is to assume, unless the contrary appears, that the recitals contained in the abstracted instruments, of any deed, will, or other document forming part of that prior title are correct and give all the material contents of such deed or document, and that each recited deed or document was duly executed and perfected.

And as shown fully *ante*, p. 81, by sub-sect. 6 of the Act, the expenses of the production and inspection of deeds and other documents *not* in the vendor's possession, and the expenses of all journeys incidental thereto, and of searching for, procuring, making, verifying, and producing all evidences *not* in the vendor's possession, and all attested or other copies of any such documents, &c., *not* in the vendor's possession, if required by the purchaser must be borne by him (sub-sect. 6). But by sub-sect. 11 nothing in the section is to be construed as binding a purchaser to complete his purchase in any case where on a contract made independently of the section and containing stipulations similar to the provisions of the sect. or any of them, specific performance of the contract would not be enforced.

Sub-sect. 11 mainly affects questions of contract limiting the title to the property offered for sale, as to which, see *ante*, pp. 48, 49.

It has been decided on the construction of the above statutes that the vendor must at his own cost furnish the purchaser with an abstract of any deed forming part of the title, either for the statutory period of forty years, or for the period fixed by the contract of sale, though not in his possession (b); as if such deed is in the possession of his mortgagee. But the cost of the production of any document not in the vendor's possession for the purpose of verification of the abstract must be borne by the purchaser (c); as also the expense of discovering the whereabouts of any such document. (d)

And as to recitals specified in the Act of 1874 (*supra*), it has been

(a) As to meaning of "land" within this sub-sect., see *ante*, p. 55.

(b) *Re Johnson and Tustin*, 30 Ch. Div. 42; 54 L. J. 889, Ch.; 53 L. T. Rep. N. S. 281; 33 W. R. 737; *Re Moody and Yates*, 30 Ch. Div. 344; 54 L. J. 886, Ch.; 33 W. R. 785.

(c) *Re Wellet and Argenti*, 60 L. T. Rep. N. S. 735.

(d) *Re Stuart and Olivant* (1896), 2 Ch. 328; 65 L. J. 576, Ch.; 74 L. T. Rep. N. S. 450; 44 W. R. 610, C. A.; *et ante*, p. 81.

held that a recital in a conveyance, more than twenty years old, that the vendor was seized in fee simple, was sufficient evidence of the fact, and that no prior title could be demanded, unless the recital was proved to be inaccurate.(a) This decision is not, however, generally liked.

Where the contract of sale of land is silent as to the title to be shown by the vendor, the legal implication that the purchaser is entitled to good title may be rebutted by evidence showing that before signing the contract he had notice that the vendor could not make out a good title. But if the contract expressly provides that a good title shall be shown, the purchaser can insist on a good title, notwithstanding that before the contract he had notice of defects in the title.(b)

As to production of deeds, the Statute 37 & 38 Vict. c. 78, s. 2, r. 3, enacts that the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title is not to be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to production of such documents.(c) By rule 4 such covenants for production as a purchaser can and shall require are to be at his cost, and the vendor is to bear the expense of perusal and execution on behalf of himself and all necessary parties other than the purchaser. Rule 5 provides that where the vendor retains any part of the estate(d) to which any documents of title relate, he is to be entitled to retain such documents. And since the operation of the 44 & 45 Vict. c. 41, s. 9, a covenant for production of deeds is no longer necessary. A mere written acknowledgment, as defined by the Act, gives the proper title to production and delivery of copies. And an undertaking gives the proper remedy in case of destruction or damage. This section will, however, be more fully considered in subsequent pages.

Prior to the operation of 37 & 38 Vict. c. 74, s. 2 (3), the want of a legal right to production of title deeds not delivered over was a fatal objection to a title.(e)

As to leaseholds for years, it has already been shown that by 37 & 38 Vict. c. 78, s. 1, and 44 & 45 Vict. c. 41, ss. 3 and 13, under an open contract, the purchaser is precluded from calling for the lessor's title. And the purchaser is to assume, unless the contrary appears, that the lease or underlease was duly granted, the receipt for the last payment of rent due being evidence of the performance of covenants in the lease or underlease. We have also referred to the cases hereon.(f)

(a) *Bolton v. London School Board*, 7 Ch. Div. 766; 47 L. J. 461, Ch.; 38 L. T. Rep. N. S. 277; 26 W. R. 549.

(b) *Re Gloag and Miller*, 23 Ch. Div. 320; 48 L. T. Rep. N. S. 629; 31 W. R. 601; *Ellis v. Rogers*, 53 L. T. Rep. N. S. 377; 29 Ch. Div. 661.

(c) It is not clear what is meant by an equitable right to production. (See *Dart's V. & P.* 160, 6th edit.)

(d) This means an estate in land, and does not apply where a mere chattel interest is retained by the vendor; *Re Williams or Fuller and Leathley* (1897), 2 Ch. 144; 66 L. J. 543, Ch.; 76 L. T. Rep. N. S. 646; *et ante*, p. 55.

(e) *Barclay v. Raine*, 1 Sim. & S. 449.

(f) *Ante*, pp. 57, 58.

We have also discussed the law bearing upon titles limited by express contract.(a)

Comparison of Abstract with title deeds, &c.

In the examination or comparison of the abstract with the title deeds and other documents set out therein, the following points must be ascertained: (1) that such deeds and documents are correctly abstracted; (2) that what, if anything, is omitted is clearly immaterial; (3) that the deeds and documents are perfect as to stamp duties, receipts, execution and attestation, enrolment or registration if necessary; and (4) that there are no indorsed notices, or any circumstances calculated to excite suspicion.

An appointment to compare the title deeds, &c., with the abstract having been made, the purchaser's solicitor attends at the place mentioned (*ante*, p. 80), accompanied by his clerk, who should slowly read the abstract while the solicitor carefully reads the deeds, &c., themselves; and, in doing this, the solicitor should read through the *whole* contents of the various documents abstracted in order to ascertain if every clause in each document is abstracted, otherwise it may happen that some important clause in a particular instrument has, either from carelessness or design, been omitted from the abstract.

It may still be necessary in some cases to see that deeds conveying realty between 15th May, 1841, and 1st Oct., 1845, are expressed to be made in pursuance of the 4 & 5 Vict. c. 21, "An Act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties." It must also be seen that these deeds bear the same amount of stamp duty (except progressive duty) as the lease and release, for which they were substituted. *bore.*(b)

Stamps.—If the amount of stamp duties has not already been noted in the margin of the abstract, the purchaser's solicitor should do this when comparing the deeds, &c., with the abstract; but as it is not, as to deeds made before 1871, the practice to count the number of folios in the various documents to see whether they are charged with the proper amount of progressive duties, now abolished, it does not appear to be of any advantage to note the number of followers.(c) It must, however, be ascertained that the amount of *ad valorem* duty is correctly impressed.

A purchaser is entitled to require that all the title deeds bear the proper stamps(d); but it has been held a purchaser is not entitled to have an unstamped title deed stamped at the vendor's expense where the deed is not necessary for the protection of the purchaser's title; and where the unstamped deed is a conveyance of the legal estate, and the vendor offers

(a) *Ante*, p. 48.

(b) Sect. 1, and 8 & 9 Vict. c. 106, s. 1.

(c) *Hughes' Pract. Conv.* 156, 157.

(d) See *Whiting to Loomes*, 14 Ch. Div. 822; 17 *Id.* 10; 50 L. J. 463, Ch.; 44 L. T. Rep. N. S. 718; 29 W. R. 435; *Coleman v. Coleman*, 79 L. T. Rep. N. S. 66.

to procure the concurrence in the conveyance to the purchaser of the conveying parties to the unstamped deed.(a)

As to the condition relating to stamping documents, see *ante*, p. 53. And as to stamp duties, &c., see *post*, tit. "Purchase Deeds," sub-tit. stamps upon conveyances; also "Mortgages," stamps on mortgages.

Execution, &c.—It must be seen that each document is properly executed and attested, and that the receipt for the consideration money (if any) is, as to deeds executed prior to 1882, duly indorsed, signed, and witnessed. But as to deeds executed after the 31st Dec., 1881, if there is a receipt for the consideration money in the body of the deed, it is sufficient without the receipt being also indorsed on the deed(b); and a receipt in the body of the deed, or indorsed thereon, is sufficient evidence of payment of the consideration money, in favour of a subsequent purchaser without notice that such money was not in fact paid.(c)

But to constitute a receipt in the body of the deed within the above Act, there should, it seems, be express words acknowledging the receipt of the consideration.(d)

If a deed has been executed under a power, it must be seen from the attestation clause that the terms of the power have been complied with(e); or if executed since the operation of 22 & 23 Vict. c. 35, s. 12, that its provisions have been complied with. This statute provides that a deed thereafter executed in the presence of, and attested by two or more witnesses shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or document not testamentary, notwithstanding it was expressly required that some additional or other form of execution or attestation should be observed. But if the deed creating the power requires any act to be done, not having reference to the mode of execution and attestation, as the consent of any person, this must still be complied with (sect 12). as already(f) pointed out.

So a will executed under a power must be executed and attested conformably to the 1 Vict. c. 26, s. 10.

If a deed has been executed by a married woman not in respect of an estate settled to her separate use(g); and not in respect of her separate property(h); or of property over which she has a general power of appointment(i); or of property which she takes as if she were a *feme*

(a) *Re Birkbeck Freehold Land Society*, 24 Ch. Div. 119; 31 W. R. 716; 52 L. J. 777, Ch.; 49 L. T. Rep. N. S. 265; where, *Whiting to Loomes, sup.*, is distinguished.

(b) 44 & 45 Vict. c. 41, s. 54.

(c) 44 & 45 Vict. c. 41, s. 55.

(d) *Renner v. Tolley*, 68 L. T. Rep. N. S. 815; W. N. (1893), 90.

(e) See Sug. Pow. 233, 236, 241, 8th edit. (f) See *ante*, p. 27.

(g) 3 & 4 Will. 4, c. 74, s. 24; *Kerr v. Brown*, 33 L. T. Rep. O. S. 179; *Taylor v. Meads*, 4 D. J. & S. 597; 34 L. J. 203, Ch.; 13 W. R. 394; 12 L. T. Rep. N. S. 6; *et ante*, p. 18.

(h) 45 & 46 Vict. c. 75, ss. 1, 2, 5; c. 38, s. 61; *et ante*, p. 15; *Riddell v. Errington*, 26 Ch. Div. 220; 50 L. T. Rep. N. S. 584; 32 W. R. 680.

(i) Sug. Pow. 153, 163, 8th edit.; *et ante*, p. 18.

sole(a); or of freehold or copyhold hereditaments vested in her as a bare trustee(*b*); all of which are more fully considered, *ante*, pp. 14 to 24; it must be seen that the husband has concurred in such deed, and if dated prior to the 1st January, 1883, that it is endorsed with a memorandum of acknowledgment by her before *two* commissioners, or a judge of the High Court, or of a County Court; and the office copy of the certificate of acknowledgment must be called for.(*c*) But since the above date it is sufficient if the deed is acknowledged before one commissioner, or a judge; and where the memorandum of acknowledgment purports to be signed by a person authorised to take the acknowledgment, the deed, as regards the execution by the married woman, takes effect at the time of acknowledgment, and is to be conclusively taken to have been duly acknowledged. No verified certificate being now necessary.(*d*) But we shall speak of the acknowledgment of deeds by married women more fully in subsequent pages of this chapter.

If any document requires enrolment to give it validity, as a bargain and sale of freeholds(*e*); or a disentailing assurance(*f*); or a conveyance under the Statute of Mortmain(*g*), it must be seen, not only that such an enrolment has been perfected, but that it was done within the time specified by the particular statute requiring such enrolment.

If the estate purchased lies in one of the register counties, which are Middlesex, York, and Kingston-upon-Hull, it must be seen that the deed is duly indorsed with the usual memorandum of registration.(*h*)

Perusal of Abstract, and Evidence in Support.

The deeds, &c., having been compared with the abstract, the next step is the perusal of the abstract. If the solicitor doubts his own ability to do this he must lay the abstract before counsel with instructions to peruse it on behalf of the purchaser. A copy of the particulars and conditions of sale must accompany the abstract. Should, however, the solicitor proceed to peruse the abstract he will keep in special view the following points:—(1) the origin of the title; (2) that the abstract shows proper conveying parties of both the legal and equitable estate; (3) that the parcels, that is the property, is properly identified as being the same as those comprised in the document forming the root of the title, and are transferred by proper operative words, and that the interest conveyed is passed by technical words of limitation; (4) that there are no incumbrances on the property save as appears by the abstract, or only such as can be discharged, as a mortgage; (5) that the documents of title are really what they purport to be.

(a) 20 & 21 Vict. c. 85, ss. 21, 25; 58 & 59 Vict. c. 39; *et ante*, p. 14.

(b) 56 & 57 Vict. c. 53, s. 16; and see *ante*, p. 17.

(c) 3 & 4 Will. 4, c. 74, ss. 79-88; 20 & 21 Vict. c. 57; 51 & 52 Vict. c. 43, s. 184.

(d) 45 & 46 Vict. c. 39, s. 7; Conv. Rules, December, 1882, rr. 1-6.

(e) See 27 Hen. 8, c. 16.

(f) 3 & 4 Will. 4, c. 74, s. 41.

(g) See *ante*, p. 3.

(h) See *hereon post*, "Searches."

It will be of considerable service to a solicitor in perusing an abstract of title to make an analysis of it as he proceeds; and for this purpose it is better to have a regular book divided into half columns or margins instead of slips of paper.

In perusing the abstract and framing requisitions on the title, the solicitor must be guided by the fact (both as to title and expenses) whether there are conditions or a contract of sale limiting the right thereon, or whether the agreement is an open one. In the former case the requisitions on the title must be confined within the limits allowed by express stipulation, subject as already stated(*a*); and in the latter case the requisitions must be framed so as not to exceed the rights of a purchaser as defined by the Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881, 1882, and 1892, which have already been partly considered in previous pages.

It is advisable that the perusal of the abstract should, if the length of it will permit, be finished at one sitting, reserving any difficult point of law for further and separate consideration(*b*).

In perusing the abstract the reader will probably discover that in addition to the abstracted documents themselves, other evidence or explanations as to matters arising out of them, or as to other facts stated in the abstract of title, will in many cases be necessary.

Deeds of Conveyance.

And first as to the title deeds: the capacity of the *parties* to convey has already been considered(*c*); and further information as to parties to deeds will be found in subsequent pages(*d*), to which the reader is referred.

Recitals.—With regard to recitals in the abstracted deeds, it has already been shown that if they are twenty years old they are sufficient, but not conclusive, evidence of the facts recited(*e*). Further remarks as to the effect of recitals will be found *post*, tit. "Purchase Deeds," sub-tit. *Recitals*.

Consideration.—In deeds of conveyance executed before 1882, if there be no endorsed receipt for the consideration money (*ante*. p. 99), this should be explained, as this fact was held prior to the Conveyancing Act 1881, ss. 54, 55, to give a purchaser constructive notice of non-payment of the purchase-money(*f*). But since the above Act, as already stated, a receipt in the body of the deed is sufficient evidence of payment in favour of a purchaser without notice. But it would seem there should be express words of receipt(*g*). And if there is any circumstance which gives rise to a doubt as to whether the consideration-money or any part of it has been paid, the doubt should be cleared up; for if not so paid a vendor may have a lien on the estate for the amount unpaid, except as

(*a*) *Ante*, p. 48. (*b*) Sug. V. & P. 412, 14th edit. (*c*) *Ante*, p. 1 et seq.

(*d*) See *post*, tit. "Purchase Deeds," sub-tit. *The Parties*; et "Settlements," sub-tit. *Parts of a Settlement*.

(*e*) See *ante*, p. 96.

(*f*) *Kennedy v. Green*, 3 My. & K. 699.

(*g*) See *ante*, p. 99; et *post*, tit. "Purchase Deeds," sub-tit. *Testatum*.

against a purchaser for value without notice.(a) The power of trustees to give receipts has already been mentioned, and will again be referred to in subsequent pages.(b)

Operative Words.—It must be seen that each deed of conveyance contains operative words of conveyance(c); and if any deed has been executed under a power requiring consent, &c., before execution, that it has been obtained, as pointed out, *ante*, p. 99; and further, if the conveyance is made by virtue of a *special* power, that the power is sufficiently referred to therein. as will be pointed out in subsequent chapters.(d)

Parcels.—As to the parcels, or property conveyed by each deed, if there is any doubt as to their identity, as may arise if there has been any alteration in the property caused by building, or by the division of fields, or new names given to them, evidence to clear up the doubt must be called for. Land tax, poor rate assessments, and receipts for rent of the premises, are usually received as evidence of identity. As to the effect of a condition negating a purchaser's right to require evidence of identity, see *ante*, p. 53.

Another query that may arise respecting the parcels, in the absence of stipulation (see *ante*, p. 54), is whether they are insured, if of an insurable nature. If the premises are in the possession of a tenant, the question will be whether he has insured in accordance with any covenant thereon in the lease, and if so, permission should be asked to inspect the policy and last receipt for payment of the premium. If, however, the vendor insures the premises, the purchaser should inquire if he will agree to hold the policy and its proceeds in case of fire, in trust for the purchaser.

It may also be prudent to inquire whether any undisclosed easement, such as a right of way of necessity, or to light, or drainage exists over the property.(e) Attention has already been drawn to this subject (*ante*, p. 89), and some further remarks thereon will be found, *post*, tit. "Purchase Deeds," sub-tit. *Exceptions and Reservations*. Another point to be noticed in regard to the parcels is as to boundaries by party-walls or fences, as to which, see *ante*, p. 92. And as to mines and minerals, see *ante*, pp. 91, 92; *et post*, tit. "Purchase Deeds," sub-tit. *Exceptions and Reservations*. If the property is let to tenants, the terms of their holdings should be ascertained, for the reasons already shown.(f)

Words of Limitation.—It should be ascertained whether there is any discrepancy between the *habendum* and the granting clause, for, as will be shown subsequently(g), an estate in fee given by the granting clause

(a) See *post*, tit. "Purchase Deeds," sub-tit. *The Testatum*.

(b) See *ante*, p. 27; *et post*, tit. "Purchase Deeds," sub-tit. *Execution of Deeds; et tit. "Settlements."*

(c) See *post*, tit. "Purchase Deeds," sub-tit. *Operative Words*.

(d) See *post*, chs. "Settlements," and "Wills."

(e) Dart's V. & P. 520, 6th edit.

(f) *Ante*, p. 86.

(g) *Post*, tit. "Purchase Deeds," sub-tit. *The Habendum*.

may be cut down by the *habendum* to an estate in fee tail. It must also be seen that proper words of limitation are contained in each deed abstracted sufficient to pass the estate purported to be conveyed(*a*); and that the uses are properly declared.(*b*)

Charges and Incumbrances.—If there is anything to give rise to the impression that there are any charges of incumbrances on the estate, other than those shown by the abstract of title, and which cannot be ascertained by due searches, inquiry must be made. For instance, if there is evidence that a road has been newly paved, an inquiry as to whether the expenses thereof have been paid might be necessary.(*c*)

So an inquiry may be necessary as to whether any widow of a preceding holder is entitled to dower out of the estate sold.(*d*)

The effect of a charge by will of debts and legacies on real estate, giving a power to trustees or executors to sell and give a valid receipt for purchase moneys, has already (*ante*, p. 25) been considered. And it has also been held that where a testator has charged his real estate with the payment of his debts generally, and also with annuities, the purchaser cannot require a release from the annuitants.(*e*) Where, however, the annuity is charged upon realty by deed, proof of the death of the annuitant must be called for, for if the annuity be subsisting, the annuitant should join in the conveyance in order to release the land from the annuity.(*f*)

Although land tax is not considered as an incumbrance (*ante*, p. 56), yet if the property is sold as discharged therefrom, the certificate of the Commissioners, with the receipt of the cashier of the Bank of England and memorandum of registration, should be called for.(*g*)

Another burden to which real estate is liable is succession duty. By 16 & 17 Vict. c. 51, all dispositions or devolutions (with a few exceptions) of property whereby any person becomes beneficially entitled thereto, or to the income thereof upon the death of any person dying after the commencement of the Act (19 May, 1853), either immediately or after any interval, &c., are deemed to confer upon the person entitled, by reason of such disposition or devolution, a "succession," and the person entitled is termed a "successor," and the settlor, testator, &c., is termed the "predecessor" (sects. 2, 17, 18, 54.)

And where a person has a general power of appointment over property to take effect on the happening of a death after the commencement of the Act, he, in the event of his making an appointment, is deemed to be entitled to the property appointed as a succession derived from the donor of the power; but where the power is a limited one, the person taking

(a) See *post*, tit. "Purchase Deeds," sub-tit. *The Habendum*.

(b) *Post*, sub-tit. *The Uses*.

(c) See *ante*, p. 89; *et post*, tit. "Searches."

(d) See *post*, tit. "Purchase Deeds," sub-tit. *Dower Uses*.

(e) *Page v. Adam*, 4 Beav. 269; 10 L. J. 407, Ch.

(f) See *Gover on Title*, 109, 2nd edit.; *Hughes v. Coles*, 27 Ch. Div. 231; 53 L. J. 1047, Ch.; 33 W. R. 27.

(g) See *ante*, p. 56.

(h)

the property appointed is deemed to take it as a succession derived from the person creating the power (sect. 4).

So where property is subject to any charge, &c., determinable on a death, &c., the increase of benefit accruing on the extinction of such charge, &c., is to be deemed a succession, accruing to the person or persons beneficially entitled to the property or income thereof, &c. (sect. 5).

Sect. 10 prescribes the different rates of duty payable; and sects. 17 & 18 exempt certain successions and successors from payment of duty, subject to the alterations made by 52 & 53 Vict. c. 7, s. 10, sub-s. 2.

Leaseholds are classed with real property: (sect 1).

The duty is a first charge and a debt due to the Crown on the interest of the successor, and of all persons claiming in his right in real property whereon the duty is assessed, and also on the interest of the successor in personal property, while the same remains in the ownership or control of the successor or of his trustee, guardian, &c., or of the husband of any wife who shall be the successor.(a) But a *bonâ fide* purchaser for value, and without notice, is protected by the receipt for payment of the duty, notwithstanding any misstatements, &c.(b) This receipt should, therefore, be called for. However, by the Inland Revenue Act, 1889, purchasers for value and mortgagees of real estate are exempted from liability to succession duty after six years from the date of written notice to the Commissioners of Inland Revenue that the successor, &c., has become entitled in possession to his succession, or from the date of the *first* payment of an instalment of duty paid under the Act, 1853 (16 & 17 Vict. c. 51); or after two years from the time for payment of the *last* instalment payable under the Act, 1888 (51 & 52 Vict. c. 8); or in the absence of such notice or payment, after twelve years from the happening of the event giving rise to an immediate claim to such duty, &c.; but the successor still continues liable, &c.(c)

In an agreement for sale of a reversionary estate, if there be no stipulation that the vendor shall pay the duty and indemnify the purchaser therefrom, or shall at once compound for and pay it; then the purchaser will be liable to pay it unless he comes within the protection given by the Acts 1853 and 1889, as stated *supra*.(d)

But where land held in fee subject to leases was sold free from incumbrances and without stipulation as to succession duty payable in respect of the increased value of the property on the determination of the leases, payment of which had been postponed, the vendor was held liable to pay it.(e)

(a) 16 & 17 Vict. c. 51, s. 42; 57 & 58 Vict. c. 30, s. 18.

(b) 16 & 17 Vict. c. 51, ss. 51, 52.

(c) 52 & 53 Vict. c. 7, ss. 12, 15; see also ss. 13, 14.

(d) 16 & 17 Vict. c. 51, ss. 15, 41; *Cooper v. Trewby*, 28 Beav. 194.

(e) *Re Kidd and Gibson's Contract* (1893), 1 Ch. 695; 62 L. J. 436, Ch.; 68 L. T. Rep. N. S. 647; 41 W. R. 507.

A new burden is now imposed upon property termed "Estate Duty," which is in lieu of probate and account duties formerly payable.

By 57 & 58 Vict. c. 30, it is provided that as to any person dying after 1st August, 1894, there must (save as thereafter expressly provided) be paid on the principal value of *all* his property, *real or personal*, settled or not settled, which passes on his death an "estate duty" at graduated rates; for determining which all his property is (unless not exceeding 1000*l.* net, &c.) to be aggregated and form one estate (sects. 1, 2, 4, 16 (3), 24; and as to definitions, see sect. 22).

It has been held that in the case of settled property estate duty is not payable upon the death of the tenant for life, where he has more than twelve months before his death surrendered his life interest in the property to the remainderman so as to merge his life estate in the remainder.^(a) But by 63 Vict. c. 7, if the tenant for life dies within twelve months from the date of the surrender it is otherwise (s. 11). This statute renders the decision in *Att.-Gen. v. De Preville*^(b) nugatory.

By sect. 9, a rateable part of the estate duty on an estate in proportion to the value of any property which does *not* pass to the executor as such^(c) is made a first charge on the property on which duty is levied (sub-sect. 1); but by sect. 8 (18) and sect. 9 (1), the property is not to be so chargeable as against a *bond fide* purchaser for value without notice. And by sect. 11, sub-sects. 1 and 4, a certificate of the Commissioners of Inland Revenue purporting to be a discharge of the whole estate duty payable in respect of property included in the certificate exonerates a *bond fide* purchaser for value without notice, notwithstanding any fraud or failure to disclose facts. This receipt should therefore be called for by the purchaser in case of a death after the operation of the Act.

By sect. 3, estate duty is not to be payable in respect of property passing on the death of the deceased, by reason only of a *bond fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, &c., where such purchase was made, or such lease, &c., granted for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, &c. (sub-sect. 1; see also sub-sect. 2).

And by sect. 8 (2), sects. 12 to 14, of the Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), are to apply to estate duty as if mentioned therein, as well as to succession duty. Sect. 12 is stated *ante*, p. 104.

The purchaser's solicitor must also bear in mind that by 57 & 58 Vict. c. 30, s. 5, where property on which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition, passes thereunder on the death of the deceased to some person

(a) *Att.-Gen. v. Beech*, (1899) A. C. 53; 68 L. J. 130, Q. B.; 79 L. T. Rep. N. S. 565; 47 W. R. 257.

(b) (1900) 1 Q. B. 223; 69 L. J. 283, Q. B.

(c) That is real estate. Personal property including leaseholds pass to the executor as such; and since the Land Transfer Act, 1897, freeholds also pass to him, as detailed *ante*, pp. 29, 33.

not competent(a) to dispose of the property (A.), a *further* estate duty (called "settlement estate duty"), on the principal value of the settled property is payable at the rate of one per cent., except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but (B.) during the continuance of the settlement the settlement estate duty is not to be payable more than once (sub-sect. 1, and sect. 17). And if estate duty has already been paid on settled property since the date of the settlement, the estate duty, &c., is not to be payable until the death of a person who was, at his death or had been at any time during the continuance of the settlement, competent to dispose of the property (sub-sect. 2); and who if on his death subsequent limitations under the settlement take effect in respect of such property was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property (61 & 62 Vict. c. 10, s. 13).

And by 57 & 58 Vict. c. 30, s. 5 (3), where the interest of any person under the settlement fails by his death before it becomes an interest in possession, and subsequent limitations thereunder continue to subsist, the property is not to be deemed to pass on his death. And by sub-sect. 4, the person paying settlement estate duty upon property comprised in a settlement may deduct the amount of *ad valorem* stamp duty, if any, charged on the settlement in respect of that property.

And by sect. 1 of the above Act, where estate duty is payable, the duties mentioned in sched. 1 to the Act are not to be levied in respect of property chargeable with estate duty.

These duties include probate duty; the duties imposed by 44 Vict. c. 12, s. 38, as amended by 52 & 53 Vict. c. 7, s. 11 (*infra*); additional succession duties imposed by 51 & 52 Vict. c. 8, s. 21; and the duty at the rate of one per cent. payable on a succession, &c. (sched. 1).

And by 57 & 58 Vict. c. 30, s. 16 (3), where the fixed duty (stated in sub-sect. 1) or estate duty has been paid on small estates, the settlement estate duty and legacy and succession duties are not to be payable thereon.

By the Inland Revenue Act, 1881 (44 Vict. c. 12), s. 38, as amended by the Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, an "account duty" was charged upon the following properties: (A.) personal property taken under a voluntary disposition made by a person dying on or after 1st June, 1881, operating as a gift *inter vivos*, not *bonâ fide* made twelve months before the death of the deceased(b), &c.; (B.) property to which he so dying, having been absolutely entitled, has voluntarily transferred to or vested in himself and another person(c) jointly, so that a

(a) By sect. 22 (2, A), a person is to be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not.

(b) See *Attorney-General v. Worrall* (1895), 1 Q. B. 99.

(c) See *Attorney-General v. Ellis* (1895), 2 Q. B. 466.

beneficial interest therein accrues by survivorship on his death to such other person; and (C.) property voluntarily settled by such deceased, otherwise than by will, with the reservation of a life, &c., interest to himself, &c.

And by 57 & 58 Vict. c. 30, s. 2 (1 c.), property passing on the death of the deceased is to include property which would be required on the death of the deceased to be included in an account under the Inland Revenue Act, 1881, s. 38, as amended by the Inland Revenue Act, 1889, s. 11, as if those sections were enacted in the Act 57 & 58 Vict. c. 30, and extended to *real* as well as to personal property, and the words "voluntary" and "voluntarily" were omitted from such sections.

The effect of the omission of these words would seem to bring antenuptial marriage settlements within the Act, but there is an exception from settlement estate duty, as already shown, when the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased (sect. 5, sub-sect. 1a; see also sect. 21, sub-sect. 5).

The Finance Act, 1896 (59 & 60 c. 28) ss. 14, 15, removes certain hardships, by which, under the terms of sect. 1 of the Finance Act of 1894(a), a person had to pay estate duty on the falling in to himself of an interest created by himself, to which sections the reader is referred. And by sect. 19, the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased is, since 1 July, 1896 (unless the will contains an express provision to the contrary), to be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate. This section renders the decision of *Gribble v. Webber*,(b) in the case of a death occurring after the 1st July, 1896, inoperative.(c)

By the Finance Act of 1894 (57 & 58 Vict. c. 30), the part of the Act relating to estate duty is to apply to estates in dower and curtesy, in like manner as it applies to property settled by the will of the deceased (sect. 22, sub-sect. 3).

As to land registered under the Land Transfer Acts being affected by succession duty and estate duty, see sect. 13 of the Land Transfer Act, 1897; *et post*, tit. "Land Transfer Acts and Rules."

Covenants.—It seems that a purchaser is not entitled to a regular string of covenants for title, at all events not where he obtains the legal estate in the property and has a covenant against incumbrances.(d) And the inability of the vendor to furnish the purchaser with a legal covenant to produce, &c., documents of title is not to be an objection when the purchaser has an equitable right to their production.(e)

(a) *Ante*, p. 105.

(b) (1896) 1 Ch. 914; 65 L. J. 544, Ch.; 74 L. T. Rep. N. S. 244; 44 W. R. 489.

(c) *Re Gibbs* (1898), 1 Ch. 625; 67 L. J. 282, Ch.; 78 L. T. Rep. N. S. 289; 46 W. R. 477.

(d) *Re Scott and Alvarez* (1895), 1 Ch. 596, 606; 64 L. J. 316, Ch. 72 L. T. Rep. N. S. 455.

(e) See *ante*, p. 97.

No estoppel can arise under the ordinary covenants for title.(a)

As it is the duty of the vendor to disclose any restrictive covenants which affect the property to any substantial extent, the burden of showing that they do not do so rests upon him; and if he cannot do so there is a valid objection to the title(b); subject to stipulation to the contrary.

Where, however, lands are taken under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), for purposes of the Act(c), whether compulsory or by agreement, subject to a restrictive covenant, the covenantee cannot sue the company for breach of the covenant; his only remedy is for compensation under sect. 68 of the Act.(d)

Further information as to covenants will be found, *post*, tit. "Purchase Deeds," sub-tit. *Covenants*; also tit. "Leases," sub-tit. *Covenants*.

Execution of Deeds.—If on examination of a deed, not executed under a power requiring signature, it appears to be without the signature of the grantor or mortgagor, this, according to some authorities, is not material, provided the deed be sealed and delivered.(e) Other authorities, however, state that since the Statute of Frauds (29 Car. 2, c. 3) signing is as essential as sealing.(f)

Although neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper, yet in a case where there was merely the piece of ribbon for keeping the seal on the parchment, without any trace of seal, the Court arrived at the conclusion that the deed was never sealed at all.(g)

Attestation is not essential to the validity of a deed (except as stated *infra*), but it is used for the purpose of preserving evidence of execution.(h) And as attestation has long been the practice if a deed is found without attestation inquiry should be made on the point.(i) As to the formalities of execution of deeds executed under powers, see *ante*, p. 99. And as to indorsed receipts on deeds executed before the Conveyancing Act, 1881, see *ante*, p. 99.

By 17 & 18 Vict. c. 125, s. 26(k), it is not necessary to prove by the

(a) *General Finance, &c., Company v. Liberator, &c., Building Society*, 10 Ch. Div. 15; 39 L. T. Rep. N. S. 600.

(b) *Re Ebsworth and Tidy*, 42 Ch. Div. 23, 51; 58 L. J. 665, Ch.; 60 L. T. Rep. N. S. 841; 37 W. R. 657.

(c) See *ante*, p. 8.

(d) *Kirby v. Harrogate School Board* (1896), 1 Ch. 437; 65 L. J. 376, Ch.; 74 L. T. Rep. N. S. 6.

(e) See *Wright v. Wakeford*, 17 Ves. 454, 459; *Taunton v. Pepler*, 6 Mad. 166; and as to a lease, see *post*.

(f) 2 Bl. Com. 306; 1 Steph. Com. 465, 12th edit.; 1 Byth. & Jarm. Conv. 739, 4th edit.; see also *Cooch v. Goodman*, 2 Q. B. 580, 597; Will. R. P. 154, 13th edit.

(g) *National Provincial Bank of England v. Jackson*, 33 Ch. Div. 1, 11; 55 L. T. Rep. N. S. 458; 34 W. R. 597.

(h) 1 St. Com. 466, 12th edit.; 1 Byth. & Jarm. Conv. 739, 4th edit.

(i) See Byth. & Jarm., *sup*.

(k) Although this section is repealed by 55 & 56 Vict. c. 19, the practice and procedure under it are preserved, by sect. 1.

attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

However, instruments which require attestation by express direction, as when executed under powers, or under some statute, as in the case of wills, warrants of attorney, conveyances under the Mortmain Acts, bills of sale, &c., must be duly attested to give them validity.

If a deed has been executed under a power of attorney, created by an instrument executed before 1st January, 1883, the production of the power should be called for, as also proof that the principal was alive at the time the power was exercised; as a power of this nature expires by the death of the principal.(a) On this point the 44 & 45 Vict. c. 41, s. 47, enacts that, after the operation of the Act, any person making any payment, or doing any act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act because, before such payment or act, the donor of the power had died, or become lunatic, or bankrupt, or had revoked the power, if the fact of death, &c., was not at the time of the payment or act known to the person making or doing the same. The right and remedy of the person interested in the money paid against the payee is, however, reserved.

This section is supplementary to sect. 26 of 22 & 23 Vict. c. 35 (repealed and re-enacted by 56 & 57 Vict. c. 53, s. 23), which only applies to trustees. It seems to enable the attorney to give a valid discharge for the purchase money, so that where the contract is binding on the vendor the purchaser would obtain a good equitable title in case of the death of the vendor. The legal estate would remain outstanding, but a conveyance could be obtained from the personal representatives under sect. 4 or 30 of the 44 & 45 Vict. c. 41, which has already been considered, *ante*, p. 66. But now, by 45 & 46 Vict. c. 39, s. 8, where a power of attorney given for valuable consideration, created by an instrument executed after the 31st December, 1882, which is in such instrument expressed to be irrevocable, then in favour of a purchaser(b), (i.) the power is not to be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee thereof, or by the death, marriage, lunacy, or bankruptcy of such donor.

And (ii.) any act done at any time by the donee of the power in pursuance of the power, is to be as valid as if anything done by the donor thereof without the concurrence of the donee had not been done, or the death, marriage, lunacy, or bankruptcy of the donor had not happened.

And (iii.) neither the donee of the power nor the purchaser is, at any time, to be prejudicially affected by notice of anything done by the donor

(a) Sug. Conc. V. & P. 420, 421.

(b) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who for valuable consideration takes or deals for property: (44 & 45 Vict. c. 39, s. 1, sub-s. 4 (ii.).

of the power, without the concurrence of the donee thereof, or of the death, marriage, &c., of the donor.

By sect. 9, if a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power (executed after the above date) expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then in favour of a purchaser (i.), the power is not to be revoked during the fixed time, either by anything done by the donor of the power without the concurrence of the donee thereof, or by the death, marriage, lunacy, or bankruptcy of such donor.

And (ii.) any act done within the fixed time by the donee of the power, in pursuance of the power, is to be as valid as if anything done by the donor thereof without the concurrence of the donee had not been done, or the death, marriage, lunacy, or bankruptcy of the donor had not happened.

And (iii.) neither the donee of the power nor the purchaser is, at any time, to be prejudicially affected by notice, either during or after the fixed time, of anything done by the donor of the power during that fixed time, without the concurrence of the donee thereof, or of the death, marriage, &c., of the donor within the fixed time.

It will be noticed that both classes of powers spoken of in these two sections must be expressed to be irrevocable by the instrument creating them. Then in favour of a purchaser for value, sect. 8 renders the power irrevocable at any time by any act of the donor alone, or by his death, &c.; and sect. 9 makes the power, whether given for value or not, in like manner irrevocable for the period fixed, which, however, must not exceed one year from the date of the instrument. So that now, whether a purchaser should call for proof that the vendor outlived the execution of the deed by his attorney will depend upon the circumstances detailed above.

As to the evidence that should be called for where a deed is executed by a married woman, see *ante*, p. 100; *et post* tit. "Purchase Deeds."

Erasures, &c.—Erasures and interlineations in a *deed* are to be presumed to be made prior to or at the time of its execution.(a) The opposite rule prevails in regard to wills.(b)

Lost Deeds.—In the absence of stipulation and subject to the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, s. 3, sub-ss. 3 and 6, the vendor is bound to produce the originals of all deeds necessary to verify the abstract, unless any of them are lost or destroyed, in which case he must verify the abstract of them by copies or other clear secondary evidence at the purchaser's expense(c); and in order to render copies admissible he must prove the loss or destruction and due execution of the originals.(d)

(a) *Doe d. Tatham v. Cattamore*, 16 Q. B. 745; 20 L. J. 365, Q. B.

(b) See *post*, tit. "Wills," sub-tit. *Alteration in Wills*.

(c) See *ante*, pp. 55, 81, 96.

(d) *Bryant v. Busk*, 4 Russ. 1; *Re Halifax Commercial Bank and Wood*, 79 L. T. Rep. N. S. 536, C. A.

Enrolment and Registration.—Where deeds, memorials, &c., are required by statute to be enrolled or registered, although the exact mode of proving such enrolment or registration will depend upon the language of each particular statute; still, where the general practice is that the officer at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of registration endorsed thereon, such certificate or memorandum will be evidence both of the fact and date of enrolment or registration.(a)

The general rule has by statute(b) been made applicable to the Chancery Enrolment Office, now the enrolment department of the central office of the High Court.(c) It applies to deeds of bargain and sale of freeholds; disentailing assurances; annuity deeds; and deeds executed under the Mortmain Acts.(d) The rule also applies to deeds, wills, &c., relating to lands and registered in the local registry of Yorkshire(e) or Middlesex.(f) So copies of documents enrolled in the central office and duly sealed are made evidence.(g)

As to proof of the enrolment of deeds, &c., relating to lands in the registries of the Duchies of Lancaster and Cornwall, see 7 & 8 Vict. c. 65, s. 34, and 11 & 12 Vict. c. 83, s. 6; and as to the enrolment of deeds, &c., in the offices of the Charity Commissioners, see 18 & 19 Vict. c. 124, s. 42.

Presumptions.

Although the foregoing contains a statement of the evidence that should properly be called for in support of the abstract of the title deeds, &c., yet in some cases, where possession has been consistent with the *prima facie* title, presumption may supply deficiencies in proof of the existence, or due execution of material instruments; the principle being that where there has been long enjoyment of any right which could have had no lawful origin except by deed, then in favour of such enjoyment, all necessary deeds may be presumed, if there be nothing to negative such presumption.(h)

Thus the fact of a lease having been duly executed has been held sufficiently proved by the production of the counterpart.(i)

So the formalities of a deed may be presumed; for instance, sealing and delivery will be presumed from proof of signing, and the whole document will, if the document comes from the proper custody, be presumed after thirty years without any proof.(k) So when an instrument is duly

(a) Taylor, Ev. 1081, 9th edit.

(b) See 12 & 13 Vict. c. 109, s. 18.

(c) See R. S. C. 1883, Ord. LXI., rr. 1, 9, 12, 13.

(d) See Taylor, Ev. 1081, *et seq.*, 9th edit.

(e) 47 & 48 Vict. c. 54, ss. 9, 32.

(f) 54 & 55 Vict. c. 64, sch. 1, r. 7; and see *post*, tit. "Searches."

(g) See 12 & 13 Vict. c. 109, s. 17; Taylor, *sup.*

(h) Dart's V. & P. 365, 6th edit.; *Lyon v. Reed*, 13 M. & W. 285; 13 L. J. 377, Ex.

(i) *Houghton v. Kanig*, 18 C. B. 235; *Burchell v. Clark*, 2 C. P. Div. 88; 46 L. J. 115, C. P.; 35 L. T. Rep. N. S. 690; 25 W. R. 334, C. A.; see also *post*, tit. "Leases."

(k) Dart's V. & P. 369, 6th edit.; 1 Tay. Ev. 86, 134, 9th edit.; but see *ante*, p. 108.

executed and accidentally lost, it will be presumed that it was duly stamped, unless evidence is given that at a particular time it was unstamped, for then the stamping must be proved.(a) So it will be presumed that stamps, the amount of which is obliterated, were of the right amount.(b)

But the Court will not presume that forms have been complied with, which the legislature has made essential to the validity of an instrument; as enrollment of a deed under the Statute of Charitable Cases.(c)

And it seems that as a general rule between vendor and purchaser, the latter must admit, as presumptions, all matters which, in a court of law, the judge would clearly direct the jury to assume; but not matters as to which the judge would leave it to the jury to find upon the effect of the evidence.(d)

The effect of 37 & 38 Vict. c. 78, ss. 1, 2, and 44 & 45 Vict. c. 41, s. 3 (3), as to recitals in documents has already (*ante*, p. 96) been stated.

Strips of waste lying beside an ancient highway, or a river, are together with the soil to the middle of the way or river, presumed to belong to the owner of the adjoining enclosed lands, and will pass with a conveyance thereof without special mention. But this presumption does not apply unless the way or bed is in the disposition of the grantor, so that it would pass if expressly mentioned.(e) The presumption as to half the soil of a road passing, applies to a street in a town.(f)

The bed of a tidal navigable river, however, and all arms of the sea, presumably belong to the Crown.(g)

As to the presumption of the fact of marriage, or of death, see *post*.

Though a lost deed may be presumed to be stamped, yet a vendor is, as a rule, responsible for his title deeds and other documents being properly stamped, and he cannot, as to any instrument executed after 16 May, 1888, negative the purchaser's right to take objection on this ground.(h)

Wills.

Where it is necessary to show seisin of a testator(i), evidence may be given of this by recitals in deeds twenty years old or upwards(k), or by the production of leases granted by the testator, followed by possession

(a) Dart's V. & P. 370, 6th edit.; 1 Tay. Ev. 133, 9th edit.; *Marine Investment Co. v. Havaside*, L. R. 5 H. L. Cas. 624; 42 L. J. 173, Ch.; *et ante* pp. 55, 110.

(b) Dart's V. & P. 370, 6th edit.

(c) *Wright v. Smythies*, 10 East, 409; Dart's V. & P. 370, 6th edit.

(d) Dart's V. & P. 371, 6th edit.; *Emery v. Grocock*, 6 Mad. 54.

(e) Dart's V. & P. 379, 6th edit.; *Micklethwaite v. Newlay Bridge Co.*, 33 Ch. Div. 133; 55 L. T. Rep. N. S. 336; *Ecroyd v. Coulthard* (1898), 2 Ch. 358; 67 L. J. 458, Ch.; 78 L. T. Rep. N. S. 702, C. A.

(f) *Re White's Charities* (1898), 1 Ch. 659; 67 L. J. 430, Ch.; 78 L. T. Rep. N. S. 550; 46 W. R. 479.

(g) Dart, 419, *sup*.

(h) See *ante*, pp. 53, 98.

(i) See *ante*, p. 75.

(k) *Ante*, p. 96.

or payment of rent ; or the production of receipts for rent given to persons who are proved *aliunde* to have been in the occupation of the premises, *e.g.*, by the production of land tax assessments, entries in parochial rate books, &c.(a)

Prior to 20 & 21 Vict. c. 77, the probate of a will was the proper evidence of a will of personalty ; but in strictness it was considered to be inadmissible to prove such parts of the will as related to real property, though it was commonly accepted by conveyancers as sufficient.(b) And now, by 20 & 21 Vict. c. 77, s. 64, the probate or a duly sealed copy of a will is *sufficient* evidence of its validity and contents, unless its validity is put in issue. And by sect. 62, where a will is proved in solemn form or its validity otherwise decided by the order of the Court, the probate, or a duly sealed copy is *conclusive evidence* of the validity and contents of the will ; save in proceedings by way of appeal under the Act.

Formerly, a will relating to realty only, even if the property devised was directed to be sold, was not proved unless executors were thereby appointed.(c) But by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3), probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

If, therefore, a will relating to realty only has not been proved, the original will must be produced. And some evidence that it is the testator's last will should be called for ; and if the lands lie in Middlesex, or Yorkshire, search should be made in the local registry.(d)

A will, like a deed, thirty years old or upwards, coming from the proper custody proves itself.(e) And it has been held that the thirty years run from the date of the will and not from the time of the death of the testator.(f)

In perusing a will disposing of realty and personalty, the reader should bear in mind the rule in *Shelley's Case*, and the rule in *Wilde's Case* ; the law as to perpetuities and accumulations ; the law as to lapse, vesting and divesting ; and other rules of law and statutory enactments affecting devises and bequests, which will be found briefly stated *post*, tit. " Wills."

Powers.

In perusing a document executed under a power the following salient points should be remembered : that a power of appointment does not operate as a conveyance of the possession of the estate, but like a bargain and sale, as a limitation of a use which the Statute of Uses (27 Hen. 8, c. 10)(g) executes, and the appointee takes from the party creating, and not from the party executing the use. Thus, immediately on the execution of a power of revocation the former uses are determined ; and by the new

(a) Dart's V. & P. 378, 6th edit.

(b) Dart's V. & P. 362. 6th edit. ; Byth. & Jarm. Conv. 167, 168, 4th edit.

(c) *Re Bootle*, L. R. 3, P. & D. 177. (d) See *post*, tit. " Searches."

(e) 1 Taylor, Ev. 87, 9th edit. ; Dart's V. & P. 363. 6th edit.

(f) Dart, *sup.* ; *McKenire v. Fraser*, 9 Ves. 5.

(g) See *post*, tit. " Purchase Deeds."

appointment the appointee is in under the original settlement. If a power be given with estates limited in default of its being exercised, immediately on the execution thereof the estates limited under the power take effect as if they were contained in the deed creating the power, and the estates limited in default cease. So, generally speaking, as to limited or special powers, as a power to lease in possession, on its execution all the estates in the settlement will be controlled and over-reached to the extent of the leases.(a)

And in addition to the points as to due execution, evidence of consents if necessary, and a reference to the power in the instrument executing the power, where the power is a special power, already(b) considered, if a power purports to be executed by the survivor of several trustees prior to the Conveyancing Act, 1881, it must be seen that this is authorised by the trust instrument.(c) The effect of the Illusory Appointments Act (37 & 38 Vict. c. 37) should also be borne in mind; also the law as to perpetuities; and as to frauds upon powers; which will be found stated in subsequent chapters.(d)

As to the execution of powers by infants, see *ante*, p. 12, *et post*.(c)

As to the execution of powers of sale by trustees or executors, see *ante*, p. 24, *et seq.*, *et post*.(e)

As to the execution of powers vested in bankrupts, see *ante*, p. 35; and as to tenants for life, *ante*, p. 21, *et seq.*, *et post*.(f)

As to powers of sale vested in mortgagees, see *post*, tit. "Mortgages."

Covenant to Stand Seised.

Another document occasionally met with is a covenant to stand seised to uses, which, like a bargain and sale(g), derives its effect from the Statute of Uses, and operates without transmutation of possession. If, before the Statute of Uses, A. had covenanted to stand seised to the use of his wife or child, this would have raised a use merely in favour of the wife or child; but, since the statute, the use is executed or turned into a legal estate in the covenantee, and any further use declared would not be executed by the statute, but remain a mere trust in equity. This mode of conveyance is only applicable when the parties stand in such relationship to each other that the consideration for the covenant is that of natural love and affection, as to a child, or near relation, or marriage. If the deed be made in consideration of money, it cannot operate as a covenant to stand seised.(h)

(a) Sug. Pow. 457, 478, 479, 483, 8th edit.; see also 45 & 46 Vict. c. 38, s. 20; *et post*, tit. "Leases," *et* tit. "Settlements."

(b) *Ante*, pp. 27, 99.

(c) See *post*, tit. "Settlements," sub-tit. *Trustee Clauses—Transmission of Powers*.

(d) See *post*, tit. "Settlements" and "Wills."

(e) See tit. "Settlements" and "Wills."

(f) See tit. "Leases" and "Settlements."

(g) See *post*, tit. "Purchase Deeds."

(h) Will. R. P. 204, 13th edit.; 2 David. Conv. Pt. 1, p. 173, 3rd edit.

As to other Matters.

Many matters respecting a title other than documentary facts already discussed will probably arise and require explanation or proof; as heirships, failure or determination of previous estates, &c.

It may be stated that the unsupported statutory declaration of a vendor as to a matter of fact material to the title and peculiarity within his own knowledge, although often accepted in practice, is not such evidence as a purchaser is bound to accept.^(a) And although statutory declarations by disinterested persons form, in many cases, the only evidence available to the conveyancer, and may be sufficient as between vendor and purchaser, they are not, as a rule, received in evidence in a hostile litigation between third parties^(b), as will be shown subsequently.

Descent and Intestacy.—Where a title, or any part of it, depends upon a descent, the pedigree or account of the descent must be proved. However, some matters are presumed; for it is a general presumption of law that a child born in wedlock is the child of the husband.^(c) The presumption may be rebutted by evidence showing (1) that the husband was incompetent; or (2) entirely absent during the period in which the child must have been begotten; or (3) present under such circumstances as afford clear proof that there was no sexual intercourse.^(d)

In establishing a descent the first thing to consider is that the descent must now be traced from the *purchaser*, and the person last entitled to the land is to be considered the purchaser, unless it is proved he inherited it.^(e) The term *pedigree* embraces the general questions of descent and relationship, and the particular facts of *marriage*, *birth*, and *death*, and the times when these events happened^(f); and may be proved as stated *infra*.

The marriage of the ancestor, the birth of the heir-at-law, and the death of the ancestor are properly proved by the production of the certificates of these facts (see *infra*), accompanied by declarations of identity^(g); or by recitals of such facts in deeds or instruments twenty years old^(h); and in the absence of such proofs by declarations made by members of the *family*; though such declarations are inadmissible in court during the lifetime of the parties, and if not made *ante litem motam*.⁽ⁱ⁾

When declarations by relations cannot be obtained, conveyancers often accept the declarations of other persons well acquainted with the family;

(a) *Hobson v. Bell*, 2 Beav. 17; 8 L. J. 241, Ch.; Dart's V. & P. 377, 6th edit.

(b) Dart's V. & P. 377, 6th edit.

(c) Dart's V. & P. 381, 6th edit.; Taylor, Ev. 101, 9th edit.

(d) *Hargrave v. Hargrave*, 9 Beav. 552, 555; *Plowes v. Bossey*, 31 L. J. 681, Ch.; 7 L. T. Rep. N. S. 306; and see *Aylesford's Peerage*, 11 App. Cas. 1.

(e) 3 & 4 Will. 4, c. 106, s. 2.

(f) Taylor, Ev. 417, 9th edit.

(g) Dart's V. & P. 392, 6th edit.; *et post*.

(h) 37 & 38 Vict. c. 78, s. 2 (2); Taylor, Ev. 423, 9th edit.; *et ante*, p. 96.

(i) Dart's V. & P. 393, 395, 6th edit.; Taylor, Ev. 418, 417, 9th edit.

although such statements are not receivable in court, unless made by a person contrary to his pecuniary or proprietary interest, and who is since dead.(a)

So statements of pedigree contained in family Bibles or Testaments, when produced from the proper custody, are admissible as evidence, even without proof that they were made by a relative.(b)

So inscriptions on tombstones, monuments, coffin plates, and the like are admissible evidence in pedigree cases; as are also armorial bearings.(c)

Whether the declarations of deceased persons can be received in evidence to prove the *place* of birth in a question of pedigree is not clear.(d)

The fact of marriage may be presumed when proof is wanting, as was done from a gift by will to a person described as the testator's "nephew," followed by the grant of administration to him, when the nephew's certificate of marriage could not be produced.(e)

Although it is a general presumption of law that a child born in wedlock is the child of the husband(f), yet declarations of the parents themselves after the birth are of little weight.(g) The declarations of a deceased person asserting his own illegitimacy are evidence against himself and those claiming under him by title derived subsequently to the statements.(h) And as to the effect of an entry in a baptismal registry, see *post*.

Intestacy is considered to be proved by the production of letters of administration of the ancestor's estate, or by evidence that no will of the ancestor was ever proved or heard of, or by producing his will, or probate thereof, which contains no devise of the estate in question.(i)

As to the effect of the registration of an affidavit of intestacy by the heir as to lands in Yorkshire giving a purchaser from him priority, see *post*, tit. "Searches."

Births, Marriages, and Deaths.—As already stated, the ordinary evidence of births, marriages, and deaths consists of certified extracts from parochial registers, or from the general register, established by 6 & 7 Will. 4, c. 86, amended by 1 Vict. c. 22; or as regards deaths, from the burial registers established by 16 & 17 Vict. c. 134, s. 8; accompanied by declarations as to identity of the parties.(k)

The parochial registers are not, as a general rule, evidence of the

(a) Dart's V. & P. 393, 6th edit.; Taylor, Ev. 434, 9th edit.; *Higham v. Ridgway*, 2 Sm. L. C. 348, 376, 9th edit.

(b) Taylor, Ev. 422, 9th edit.; *Hubbard v. Lees*, L. R. 1 Ex. 255.

(c) Taylor, Ev. 424, 426, 9th edit.; Dart's V. & P. 394, 6th edit.

(d) See *R. v. Erith*, 8 East, 539; Taylor Ev. 420, 9th edit.; 1 Byth. and Jarm. 154, 4th edit.

(e) *Shrewsbury Peerage*, 7 H. L. Cas. 1; and see other instances, Dart's V. & P. 383; 1 Byth. & Jarm. Conv. 158, 4th edit.

(f) See *ante*, p. 115.

(g) 1 Byth. & Jarm. Conv. 156, 4th edit.

(h) Taylor, Ev. 414, 9th edit.

(i) 1 Byth. & Jarm. Conv. 148, 4th edit.; *Games v. Bonnor*, 33 W. R. 66, C. A.

(k) Dart's V. & P. 392, 6th edit.

time or order of a birth : but they are evidence of the time as well as of the fact of marriage.(a) And it has also been held that the registry of birth under 6 & 7 Will. 4, c. 86, is evidence of the fact of birth (sect. 38), but not of the exact date,(b) and an entry in the baptismal register of the date of birth is not proof *per se* that the child was born on that day(c); therefore, evidence of the latter fact should, if important, be called for.

Extracts from non-parochial registers have usually been received by conveyancers as evidence,(d) and by 3 & 4 Vict. c. 92, s. 6. all registers and records deposited in the general registry office under that Act (with certain exceptions) are to be deemed to be in legal custody, &c., and by sects. 11, 13, certified extracts therefrom are made evidence in Court.

Death may be presumed : If a person has not been heard of for seven years, there is a presumption of law that he is dead ; but at what time within that period he died is a matter of evidence, and not of presumption ; and the onus of proving the time lies upon the person who claims a right, to the establishment of which that fact is essential.(e) However, a learned writer states that as between vendor and purchaser no presumption of death arises from the mere fact of a person having been unheard of for seven years.(f)

Where estates are alleged to have vested on account of failure of issue, such facts must be proved as tend to show this : As by the testimony of living witnesses having the means of knowledge ; or by the declarations of deceased relatives ; or (in conveyancing practice) of persons acquainted with the family, as are used to substantiate a pedigree already stated ; or facts which tend to show the celibacy of the party ; or the grant of letters of administration to distant relatives.(g)

Crown Grants. &c.—A grant from the Crown is, it seems, regularly proved by an exemplification, or certified copy ; but if the original is lost, and the vendor's solicitor informs the purchaser where the grant is enrolled, the latter cannot, it seems, require a copy, but must examine the enrolment.(h)

Proceedings in Courts.—By R.S.C., Ord. 37, office copies of all writs, records, &c., filed in the High Court. are to be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible (r. 4). Proof of the seal or signature is rendered unnecessary by 8 & 9 Vict. c. 113, and Ord. 61, r. 7.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 134, a petition or copy of a petition in bankruptcy, order, or copy of an order, certificate,

(a) Dart, *sup* ; 1 Byth. & Jarm. Conv. 156, 4th edit.

(b) *Re Wintle*, L. R. 9 Eq. 373 ; and see Taylor, Ev. 1171, 9th edit.

(c) *Re Turner*, 29 Ch. Div. 985 ; 53 L. T. Rep. N. S. 528 ; and see Taylor, Ev. 1170, 9th. edit.

(d) Dart's V. & P. 392, 6th edit.

(e) *Nepean v. Doe*, 2 M. & W. 894, 910 ; Sm. L. C., vol. 2 ; *Re Phené's Trusts*, 5 Ch. App. 139 ; 39 L. J. 316, Ch. ; Taylor, Ev. 172, 9th edit.

(f) See Dart's V. & P. 385, 6th edit. (g) See Dart's V. & P. 390, 6th edit.

(h) Dart's V. & P. 359, 6th edit. ; and see Taylor, Ev. 1007, 9th edit.

or copy of a certificate, made by a Court having jurisdiction in bankruptcy, or any document made or used in bankruptcy proceedings, is, if sealed with the seal of the Court, or signed by any Judge thereof, or certified as a true copy by any registrar thereof, receivable in evidence; and by sect. 137, judicial notice is to be taken of the seal of the Court and signature of the Judge or registrar. And by sect. 133, a minute of proceedings at a meeting of creditors under the Act, signed by the chairman thereat, is to be receivable in evidence without further proof. And by sect. 188, a certificate of the Board of Trade of the appointment of a trustee under the Act is to be conclusive evidence of his appointment.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 106, 107, and 109, now repealed, contained similar provisions.

By the Lunacy Act, 1890 (53 Vict. c. 5), s. 144, every office copy of an order or report in lunacy, confirmed by fiat, signed by a master, and sealed or stamped with the seal of his office, and every office copy of a certificate in lunacy is to be evidence for all purposes. The statute 16 & 17 Vict. c. 70, s. 100, now repealed, contained a similar enactment.

Public Documents.—By 14 & 15 Vict. c. 99, s. 14, whenever any book or other document is of such a public nature as to be admissible in evidence on production from the proper custody, and no statute exists rendering its contents provable by means of a copy, any copy thereof, or extract therefrom is to be admissible in evidence, if proved to be an examined copy or extract, or if it is signed and certified as a true copy or extract by the officer having the custody of the original.

Extracts from parish registers of births, &c., signed by the incumbent, or curate, come within the provisions of the above section.(a)

Private Acts.—By 8 & 9 Vict. c. 113, all copies of private and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, are to be admitted as evidence, without proof that such copies were so printed (sect. 3).

Awards.—By 3 & 4 Will. 4, c. 87, an award under an Inclosure Act is proved by a copy signed by the proper officer of the Court where it is enrolled, or by the clerk of the peace for the county, or his deputy, if an enrolment be made with the clerk of the peace (sect. 2, and see *ante*, p. 77).

Copyholds.

Copyhold assurances are proved by the copies of Court roll signed by the steward(b); and as to the practice hereon, see *post*, tit. "Copyholds."

Leaseholds.

In regard to a sale of leaseholds for years, a purchaser has a right to call for the production of the lease however old; but he is bound to assume that the lease or underlease was duly granted, unless the contrary appears; and as the production of the receipt for the last payment due

(a) *Re Hall's Estate*, 22 L. J. 177, Ch.; 1 W. R. 2; *Re Porter*, 25 L. J. 688, Ch.

(b) See Dart's V. & P. 351, 6th edit.

for rent before completion, is made evidence of the performance of the covenants and provisoes in the lease up to the date of completion, that receipt must be called for, as already shown.(a)

On the sale of renewable leaseholds, if the lease is expressed to be granted in consideration of the surrender of the prior lease, the title to the surrendered lease must be called for (b); in the absence of stipulation to the contrary.

Where the lease bought is held for lives, evidence must be called for showing that the lives are in existence.(c)

If a purchaser buys a part of property comprised in a lease subject to an apportioned part of the original rent for the whole, he should, in the absence of stipulation to the contrary, call upon the vendor to show that the apportionment is properly effected. We have, however, already (*ante*. p. 56) referred to this point.

If the vendor of leaseholds, which have been specifically bequeathed, be an executor, it is usual to call upon him to show that he has not assented to the legacy, or otherwise to have the concurrence of the legatee in the assignment. So when the sale is by the legatee, evidence of the assent of the executor to the bequest must be called for, or his concurrence in the assignment be obtained. Before payment of the purchase-money is made, probate of the testator's will should be called for, even when the sale is by the executor, for the reasons already stated.(d)

If any licence is necessary before an assignment of the lease can be validly made, this must be called for.(e)

As to the inquiry whether the premises are insured, if of an insurable nature, see *ante*, pp. 54, 102.

The executor of a sole executor, who has not fully administered, represents the original testator's personal estate, including chattels real; not so, however, the administrator of an executor.(f) An executor cannot renounce probate of the first will and take probate of the second.(g) If the original testator appoints two executors and one of them renounces, the 20 & 21 Vict. c. 77, enacts that the rights of the renouncing executor in respect of the executorship is to wholly cease as if he had not been named an executor (sect. 79). This apparently altered the practice, for formerly a renouncing executor might have retracted his renunciation before the actual grant of administration *de bonis non* to the original testator, but not afterwards.(h)

And it has recently been held that, notwithstanding sect. 79, a renouncing executor may, where it is for the benefit of the estate, be allowed by the Court to retract his renunciation and take probate.(i) So that

(a) See *ante*, pp. 57, 58.

(b) *Hodgkinson v. Cooper*, 9 Beav. 304; Dart's V. & P. 332, 6th edit.

(c) Dart, *sup*.

(d) See *ante*, pp. 31, 32; *et post*, tit. "Leases."

(e) See *post*, tit. "Leases."

(f) Will. Exors. 204, 9th edit.

(g) *Brook v. Haymes*, L. R. 6 Eq. 25; *Re Perry*, 2 Curt. 655.

(h) Will. Exors. 206, 233, 9th edit.

(i) *In bonis Stiles* (1898), P. 12; 67 L. J. 23, P. & D.; 78 L. T. Rep. N. S. 82; 46 W. R. 444.

where two executors have been appointed and one renounces, and the acting executor before he has fully administered makes a will appointing an executor, and dies, inquiry should be made as to whether the renouncing executor has been permitted to retract his renunciation.

As to satisfied terms, the 8 & 9 Vict. c. 112, enacts that all satisfied terms of years which were attendant on the inheritance on the 31st December, 1845, were on that day to cease; but if attendant by express declaration they are to continue the same protection against incumbrances as if they subsisted: (sect. 1). And all terms becoming satisfied after 31st December, 1845, and attendant upon the inheritance, are to cease: (sect. 2). This Act puts an end to the assignment of satisfied terms as a protection to a purchaser who became such after the Act.(a) However, in purchasing property out of which the term was created, it must be seen that the term is actually satisfied.(b)

Registered Land.

As to what the abstract of title should contain, and what title can be called for, when the land has been registered under the Land Transfer Acts, see *post*, that title.

The Requisitions.

As to the requisitions themselves, if the abstract has been laid before counsel for his opinion on the title, the requisitions would no doubt be drawn from that opinion. Subject to this, the purchaser's solicitor should note to what extent he is bound by the contract of sale, or by statute, as to the title, and not take frivolous or untenable objections, first because they are not liked by the Court, and secondly some expenses which were formerly borne by the vendor are now by statute thrown upon the purchaser, as already (c) shown. On the other hand, a purchaser should not hold back important objections or requisitions, for if he knowingly do so the question may arise whether he has not impliedly waived them.(d)

Such an act as the preparation of the conveyance cannot in general be relied on as evidence of waiver. Taking possession of the property by the purchaser is the fact most usually relied upon as furnishing evidence of waiver of objections to the title(e); which has already (*ante*, p. 94) been considered.

The requisitions often contain a general question as to whether there are any incumbrances affecting the property not appearing on the abstract. To this question the vendor or his solicitor is not bound to give any answer.(f) For a vendor or his solicitor who fraudulently conceals any

(a) See Sug. Conc. V. & P. 373, 383; Sug. R. P. Stats. 288.

(b) See *Anderson v. Pignet*, 8 Ch. App. 180; 42 L. J. 310, Ch.

(c) See *ante*, pp. 81, 96.

(d) Dart's V. & P. 493, 494, 6th edit.

(e) Dart's V. & P. 497, 449, 6th edit.

(f) *Re Ford and Hill*, 10 Ch. Div. 365; 48 L. J. 327, Ch.; 40 L. T. Rep. N. S. 41

instrument, material to the title, or any incumbrance, is guilty of a misdemeanor punishable by fine or imprisonment.(a)

A fair copy of the requisitions is made on foolscap paper in half margin, the right-hand half being left clear for the answers to the requisitions. This fair copy is sent to the vendor's solicitor.

Having received the answers to the requisitions on the title, the purchaser's solicitor will carefully consider whether they are sufficient, and if he has any doubt on the point it will be advisable to lay them before counsel for his opinion thereon. If this is done, a copy of the abstract of title and of the contract or conditions of sale should accompany the requisitions.

By the 37 & 38 Vict. c. 78, s. 9, it is provided that a vendor or purchaser of real or leasehold estate in England may apply to a judge of the Chancery Division in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being one affecting the validity of the contract), and the judge will make such order as may be just, and direct by whom and how the costs of and incident to the application are to be paid. The decisions on this section are given *ante*, p. 69.

The purchaser is entitled to the custody of the abstract until the contract is formally abandoned by both parties, or is declared impracticable by the Court. He is not entitled to retain even a copy of it. But if he has submitted it to counsel he is entitled to retain counsel's opinion and observations, if written on separate paper.(b)

Purchase Deeds.

The requisitions and objections having been satisfactorily answered, and the title approved of, the next step is the preparation of the purchase deed by the solicitor for the purchaser, or by counsel from his instructions. If counsel is instructed to draw the conveyance, the abstract of title, requisitions and answers, accompany the instructions. The following brief sketch of the several changes that have taken place in the mode of transferring freehold property may be of service to the reader.

Prior to the reign of Henry 8, a freehold estate in possession was usually transferred from one person to another by the delivery of some symbol of possession (as a turf or a wand), upon the land, attended with apt words. This mode of conveyance was called a *feoffment*. It was by the Statute of Frauds (29 Car. 2, c. 3) required to be put into writing, the livery of seisin being still necessary, of which there are two kinds, namely, a livery in *deed*, and a livery in *law*. The effect of a feoffment was always to convey some estate of *freehold*.

This mode of conveyance was used for transferring estates of freehold (except estates tail and dower, of which more hereafter) till the reign of Henry 8, and in that reign a new mode of conveyance was discovered, by means of the Statute of Uses, 27 Hen. 8, c. 10.

(a) 22 & 23 Vict. c. 35, s. 24; *et ante*, p. 42.

(b) Sug. V. & P. 428, 14th edit.; Dart's V. & P. 319, 6th edit.

Before this statute the Court of Chancery had begun to exercise jurisdiction over land, and to compel the enforcement of *uses and trusts*. Thus, if a feoffment were made to A. and his heirs *to the use of* B. and his heirs, equity compelled A. to hold the legal estate for B.'s benefit, whom they considered the real owner. So if A. had agreed with B. to sell, and B. to purchase A.'s land, and B. paid the price, equity compelled A. to hold the land *to the use of* B., as in the last case.

In course of time great evils resulted from this separation of the real and ostensible ownership, and so great was this felt that the legislature was called in to put a stop to it, and the statute 27 Hen. 8, c. 10, accordingly enacts, that where any person or persons stand *seised* of any lands, &c., *to the use*, &c., of any other person or persons, &c., such person or persons that have such use, &c., shall thenceforth stand and be seised in lawful seisin and possession of and in the same land, &c., to all intent and purposes in the law, and in such estates as they had or shall have in the use, &c. Thus does the statute turn the use into an estate in possession.

By means of this statute a man could get the legal and equitable interest in real property without any livery of seisin or formality of any kind, and without a deed; for, as before stated, if one agreed to sell, and another to purchase, and the price was paid, the seller stood seised to the use of the buyer, and this use the Statute of Uses turned into an estate in possession, which mode of conveyance was termed a *bargain and sale*. This was felt to be an evil, the statute 27 Hen. 8, c. 16 (called the Statute of Enrolment), therefore, enacted that all bargains and sales of *freeholds* should be by deed, and enrolled within six months after execution. But this Act does not require a bargain and sale of *leaseholds* to be enrolled. Therefore, our ancestors, by means of the Statute of Uses, found out a mode of conveyance without the necessity of an actual entry, and without enrolment. The mode was thus: the lands were bargained and sold to the use of the purchaser for a year, the Statute of Uses turned the use into an estate in possession without the necessity of entry and being only a chattel interest, it did not require enrolment. The purchaser being now in possession was in a position to receive a release of the reversion and freehold (for *incorporeal* hereditaments were always said to lie in *grant*, and were conveyed by deed), which was accordingly done by another deed, and these two instruments were called a *lease and release*, forming, in point of fact, but one deed, and was the mode in general use for conveying real property till the year 1841. In that year the 4 & 5 Vict. c. 21, enacted that any deed of release, if purporting to be made *in pursuance of the Act*, should be as effectual for the conveyance of freehold estates as a lease and release by the same parties.

By a later Act (8 & 9 Vict. c. 106), although feoffments (other than a feoffment under a custom by an infant) are required to be evidenced by deed, it is enacted that all corporeal tenements and hereditaments shall, so far as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery (sects. 2, 3). From this

time it became the practice to use the word *grant* as the technical operative word in a conveyance of freehold land. The 44 & 45 Vict. c. 41, s. 49, however, declares that the use of the word *grant* is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. In future, therefore, either the word *grant* or the word *convey* may be used as the operative word in an instrument of conveyance.

Since the operation of 44 & 45 Vict. c. 41, an ordinary purchase deed will consist of the following parts :

1. The date.
2. The parties.
3. The recitals, where necessary.
4. The testatum, containing (i.) the consideration and its receipt, (ii.) the operative words granting or releasing (iii.) the parcels, this technical word meaning the property.
5. The habendum, marking out the estate and declaring the uses.
6. The covenants, express or implied.
7. The conclusion, commencing with the words "In Witness whereof."

1. *The Date.*

It is not essential to a deed that it should be dated, for if it has no date, or an impossible date, it will take effect from the time of its delivery.(a)

By the Yorkshire Registration Act, subject as in the Act mentioned, all assurances entitled to be registered are to have priority according to the date of registration, and not according to the date of such assurances or their execution.(b) The effect is the same as to deeds registered in Middlesex.(c)

2. *The Parties.*

Formerly it was a general rule of law that all persons who were intended to take an *immediate* estate or benefit by a deed *inter partes* should be named as parties to it.(d) By 8 & 9 Vict. c. 106, s. 5, however, under an indenture executed after 1st Oct., 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the indenture.

It will be noticed that this section applies only to tenements or hereditaments.

A person dead at the time of the execution of a deed cannot take any benefit under it, and cannot, therefore, transmit any interest to his representatives.(e)

(a) 1 St. C. 493, 10th edit.; 1 David. Conv. 25, 5th edit.; *Browne v. Burton*, 17 L. J. 49, Q. B.

(b) 47 & 48 Vict. c. 54, s. 14; 48 & 49 Vict. c. 26, s. 4; *et post.*

(c) 7 Anne c. 20, s. 1.

(d) 1 David. Conv. 37, 4th edit.; 29, 5th edit.

(e) *Re Corbishley's Trusts*, 14 Ch. Div. 846; *Re Tilt*; *Lampett v. Kennedy*, 74 L. T. Rep. N. S. 163.

Every person having a separate estate or interest should as a rule be of a separate part, and all persons having a joint or identical estate or interest should be of the same part, thus joint tenants conveying their joint estate to a purchaser are of one part only, but not if they were making a partition of the joint estate by deed, for then they would be of separate parts. Trustees are of the same part in respect to their trust.(a)

The names of persons from whom anything is to pass are placed first in the instrument. Thus the vendor (or mortgagor or lessor) is placed first. And those having a legal estate come before those having an equitable estate in the property dealt with.

Where a married woman is a conveying party to a deed in respect of property which she cannot convey without (b) her husband's concurrence, he must be made a party (unless his concurrence be dispensed with by the Court), and husband and wife are of one part only, and the deed must be duly acknowledged by the wife, as fully stated *post*. So if she be married before the Dower Act, and her dower has attached to lands of inheritance of her husband, which he is conveying, she must join in the deed for the purpose of releasing her dower, and the deed must be acknowledged by her.(c)

The vendor is bound to obtain the concurrence of all necessary parties to the transfer of the property who are bound to convey at his request ; but not that of unnecessary parties. Therefore a mortgagee with a power of sale may sell without obtaining the concurrence of the mortgagor.(d) And although by 46 & 47 Vict. c. 52, a bankrupt is to execute all such conveyances, &c., in relation to his property, &c., as may be reasonably required by the trustee, &c. (sect. 24 (2)), yet his joinder in the conveyance may in most cases be safely dispensed with, as his covenants for title are obviously of little value, and the trustee in whom the bankrupt's estate is vested can by sect. 56 make a good title to it without his concurrence.(e)

A vendor may, however, be compelled to obtain the concurrence of trustees of the legal estate.(f) And if trustees under a settlement of settled lands are vendors, it is provided by 45 & 46 Vict. c. 38, s. 56 (2), that where there is a conflict between the provisions of a settlement and the provisions of the Act relative to any matter in respect of which the tenant for life exercises or contracts or intends to exercise any power under the Act, the provisions of the Act are to prevail ; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life is necessary to the exercise by the trustee of the settlement of any power conferred by the settlement exercisable for any purpose provided for in the Act.(g)

(a) David. Conv. 38, 4th edit. ; 30, 5th edit. ; 5 Byth. & Jarm. Conv. 123, 4th edit.

(b) See *ante*, pp. 18 to 21.

(c) See *post*, sub-tit. *Dower Uses*.

(d) *Corder v. Morgan*, 18 Ves. 344 ; Dart's V. & P. 582, 6th edit.

(e) See Dart's V. & P. 583, 6th edit. ; *et ante*, p. 36.

(f) Dart's V. & P. 582, 6th edit.

(g) See also *ante*, p. 27, *et post*, tit. "Settlements."

And by 47 & 48 Vict. c. 18, s. 6 (2), in case of a settlement, not within the meaning of sect. 63 of the Act of 1882, where two or more persons together constitute the tenant for life, the consent of any one of them is sufficient. Prior to this Act it was held that where there was an absolute trust for sale, or where a sale was ordered by the Court, the consent of the tenant for life was not necessary.(a)

And although 45 & 46 Vict. c. 38 gives a tenant for life power to sell the settled land, or any easement, right, or privilege over or in relation to the same, and to make exchanges thereof, &c., and to convey, &c., the same by deed, observing the stipulations and directions given by the Act, yet he is restricted by 53 & 54 Vict. c. 69, s. 10, from selling, exchanging, or leasing the principal mansion house (if any) on the settled land, and the pleasure grounds and park, and lands (if any) usually occupied therewith, without the consent of the trustees of the settlement or an order of the court.(b)

And where trustees had a power of sale with the consent of the tenant for life, who had incumbered his interest and become bankrupt, it was held that the trustees were bound to obtain not only the consent of the tenant for life, but also that of the incumbrancer, and of the trustee in bankruptcy.(c)

Persons are also sometimes made parties for the purpose of obtaining covenants for title from them, as where trustees are selling, it is a practice of conveyancers to make the beneficiaries who take a substantial interest in the proceeds of the sale by the trustees, covenant to the extent of that interest,(d) but in the case of a sale under a decree of the court the purchaser is not entitled to covenants for title from the beneficiaries in the proceeds of the sale.(e) Some further remarks on this subject will be found *post*, sub-tit. *Covenants*.

3. The Recitals.

This part of a deed is a narrative in a condensed form of facts and instruments, showing the title, and the relation of the parties to the subject matter, and the motive for the operative parts of the deed. Those recitals which set forth the facts and instruments are termed narrative; those which explain the motive for the operative parts introductory *ex. gr.*, in a purchase deed the recital of the contract of sale is an introductory recital.(f)

(a) *Taylor v. Poncia*, 25 Ch. Div. 646; 53 L. J. 409, Ch.; 50 L. T. Rep. N. S. 20; 32 W. R. 335.

(b) See *post*, tit. "Settlements."

(c) *Re Beddingfield and Herring* (1893), 2 Ch. 332; 62 L. J. 430; 68 L. T. Rep. N. S. 634; 41 W. R. 413.

(d) Dart's V. & P. 617, 6th edit.

(e) *Cottrell v. Cottrell*, L. R. 2 Eq. 330; 35 L. J. 446, Ch.; 14 L. T. Rep. N. S. 220; 14 W. R. 572.

(f) 1 David. Conv. 44, 49, 4th edit.; 36, 40, 5th edit.

Where the title and the relation of the parties to the subject matter is so simple as to need no explanation, recitals are unnecessary, as if the estate to be conveyed is vested in the person about to convey it for an estate in fee simple, which is unincumbered.(a) Yet it must be remembered that by the Vendor and Purchaser Act, 1874, s. 2, recitals in deeds twenty years old are evidence of the facts recited.(b)

And where property belongs to several persons for several particular estates or is subject to mortgages or other incumbrances, it is usual and almost necessary to explain by narrative recitals the interests of the several parties, and by an introductory recital what they intend to do.(c) So if the vendor is a trustee for sale, the trust instrument should be recited.(d) And where it is proposed to exercise a power given by an instrument in recital, that instrument should be fully recited.(e)

In a release of claims, recitals are usual and proper, as the rule of equity is that a release of claims however generally expressed only extends to claims of which the releasor is cognisant; consequently a release should on its face show precisely the claims intended to be released. The recitals should, therefore, show in detail the origin of the claims to be released, the circumstances and events which have happened or arisen in connection with them, and why it is intended to release them.(f)

Every fact and instrument should, as a rule, be recited in the order of its date.(g)

Where recitals and the operative part of a deed are at variance, the recitals may explain doubtful expressions, but not cut down the plain effect of nor ordinarily supply a total omission in, the operative part of the deed. As a rule, where there is a discrepancy between the recitals and the operative part, the former being clear as to what is intended to be conveyed, and the latter contains wide sweeping words of conveyance, the operative part will be restricted. So in the converse case, the generality of the recitals may be restricted by the form of the operative part of the deed.(h)

Indorsed or supplemental deeds should not contain any recital of the deed on which they are indorsed, or to which they are supplemental, for a person has the opportunity of reading such other deed.(i)

An estoppel may arise by recital, if the matter be precisely and directly

(a) 1 David. Conv. 44, 4th edit. ; 36, 5th edit.

(b) See hereon, ante, pp. 96, 101.

(c) 1 David. Conv. 45, 4th edit. ; 37, 5th edit.

(d) 1 Prid. Conv. 197, 14th edit. ; 189, 17th edit.

(e) 1 David. Conv. 47, 5th edit.

(f) 1 David. Conv. 46, 4th edit. ; 37, 5th edit. ; *Brooke v. Haymes*, L. R. 6 Eq. 25 ; and see forms David. Conc. Pr. 555, et seq., 16th edit.

(g) 1 David. Conv. 47, 4th edit. ; 39, 5th edit.

(h) *Hopkinson v. Lusk*, 10 L. T. Rep. N. S. 122 ; *Dart's V. & P.* 594, 6th edit. ; *Ex parte Dawes* ; *Re Moon*, 17 Q. B. Div. 275 ; 55 L. T. Rep. N. S. 114 ; *Dawes v. Tredwell*, 18 Ch. Div. 354, 358 ; 45 L. T. Rep. N. S. 119.

(i) 1 David. Conv. 47, 4th edit. ; 51, 5th edit.

alleged, but it is only evidence against the parties to the instrument and those claiming under them.(a)

4. *The Testatum.*

As already stated, the testatum contains the consideration and its receipt, the operative words, followed by a description of the property granted, conveyed, or released. We propose to take these in their order.

The Consideration.—The want of a consideration does not as a general rule render a deed void, as a deed is supposed by law to be made with due deliberation and to express fully and absolutely the intention of the party executing it.(b)

Certain statutes, however, render deeds which are made without consideration void against creditors,(c) and formerly, if of lands or tenements, also against purchasers for value.(d) or mortgagees,(e) as will be shown more fully subsequently.(f) But by 56 & 57 Vict. c. 21, no voluntary conveyance of any lands, tenements or hereditaments, whether made before or after that Act, if *bona fide* and without fraudulent intent, is hereafter to be deemed fraudulent within 27 Eliz. c. 4, by reason of a subsequent purchase for value, or be defeated under that Act by a conveyance made upon such a purchase. However, if the conveyance to the purchaser for value is completed before the passing of the 56 & 57 Vict. c. 21, that Act does not apply.

We have already (*ante*, p. 61) treated of the effect of inadequacy of consideration for a contract, and of the jurisdiction of the Court to set aside the transaction where such inadequacy occurs in dealings with an expectant heir, &c.

The statement of the payment of the consideration is followed by an acknowledgment of its receipt. It was also, prior to the Conveyancing Act, 1881, usual to indorse on the deed an additional receipt for the consideration, which was in equity considered important (see *ante*, p. 101).

A receipt in the body of the deed, unlike the indorsed receipt, amounted to an estoppel at law between the parties to the deed.(g) But this rule did not prevail in equity (and now the rule in equity is to prevail) (h), for if the consideration was not in fact paid, the vendor had, and still has, a right to prove that fact, upon which equity gives him a lien on the estate conveyed for his unpaid purchase money. And this lien prevails not only against the purchaser, but also against his heir or devisee, and all volunteers claiming under him, and even against a purchaser with notice, or without notice, if he has only an equitable

(a) *Heath v. Crealock*, 10 Ch. App. 22, 34; 1 David. Conv. 51, 5th edit.

(b) 1 St. Com. 469, 12th edit.; 1 David. Conv. 68, 4th edit; 57, 5th edit.

(c) 13 Eliz. c. 5; 46 & 47 Vict. c. 52, s. 47.

(d) 27 Eliz. c. 4.

(e) *Dolphin v. Ayhward*, L. R. 4, H. L. 486.

(f) See *post*, tit. "Settlements," sub-tit. *Voluntary Settlements*.

(g) 1 David. Conv. 66, 4th edit.; 55, 5th edit.

(h) 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

title, with no greater equity than the vendor. But it will not prevail against a *bond fide* purchaser for value without notice clothed with the legal estate.(a)

Nor, it has been held, will the lien continue against a purchaser of leaseholds without notice, though the consideration be natural love and affection, on account of the burdensome covenants in a lease on the tenant's part.(b)

And the vendor may waive his lien by the terms of his conveyance (c); or by his conduct, as by permitting his purchaser to register the conveyance in a register county, knowing he intended to sell the property (d); so taking and relying upon another security may be evidence of waiver according to circumstances, the nature of the security, &c., the burden of proof being upon the purchaser.(e) But *prima facie*, the taking of a mere personal security, as a bill of exchange, is not evidence of an intention to abandon the lien.(f)

By 44 & 45 Vict. c. 41, s. 54, it is enacted that a receipt for the consideration money in the body of the deed is a sufficient discharge for the same to the person paying the same without a receipt thereof being indorsed on the deed, so far as regards deeds executed after the Act commences. And by sect. 55 a receipt for the consideration money in the body of the deed, or indorsed thereon, is sufficient evidence of payment in favour of a subsequent purchaser without notice that the money thereby acknowledged to be received was not in fact paid. This section only applies to deeds executed after the commencement of the Act.

The effect of these two sections is, it seems, to make the receipt in the body of the deed the same evidence of payment as the two receipts formerly had.(g) But to constitute a receipt in the body of the deed within these sections there should, it seems, be express words acknowledging the receipt of the consideration.(h)

If on the purchase of a freehold, copyhold, or leasehold estate, the purchase money is paid by the real purchaser, but the conveyance or assignment is taken in the name of a stranger, there is, as a rule, a resulting trust of the legal estate in favour of the real purchaser without any written declaration of trust, as the Statute of Frauds, by sect. 8, excepts trusts arising by construction of law from the operation of sect. 7, which requires declarations of trusts of lands, tenements, or hereditaments

(a) See Dart's V. & P. 825, 6th edit.; Story's Eq. sect. 1217, *et seq.*; *Macreth v. Symmons*, 1 L. C. Eq. 355, *et seq.*, 6th edit.; 2 *Id.* 926, *et seq.*, 7th edit.; *Kettlewell v. Watson*, 26 Ch. Div. 501; 53 L. J. 717, Ch.; 51 L. T. Rep. N. S. 135; 32 W. R. 865, C. A.

(b) *Harris v. Tubb*, 42 Ch. Div. 79; 58 L. J. 434, Ch.; 60 L. T. Rep. N. S. 699; 38 W. R. 75.

(c) *Re Brentwood Brick Company*, 4 Ch. Div. 562, C. A.

(d) *Kettlewell v. Watson*, *sup.*

(e) *Macreth v. Symmons*, *sup.*; Dart's V. & P. 829, 6th edit.

(f) *Grant v. Mills*, 2 Ves. & B. 306.

(g) See Dart's V. & P. 825, 6th edit.; Hood and Challis Conv. 136, 5th edit.

(h) See *ante*, p. 99.

to be in writing, signed by the person declaring the trust. Similar principles apply to securities taken in the name of a stranger.(a)

Although the purchaser may prove the payment of the purchase money by parol evidence, such evidence must prove the fact very clearly. And whether parol evidence is admissible after the death of the supposed nominal purchaser is not so clear.(b) Parol evidence may also be received to rebut the presumption of a resulting trust.(c)

The court cannot imply a resulting trust in evasion of an Act of Parliament.(d)

Generally there will be no resulting trust where a purchase is made or security is taken by a husband in the name of his wife (e), or child (f), or even an illegitimate child if treated as a child (g); because in these cases it is presumed that a provision and advancement for the wife or child is intended. This presumption may, however, be rebutted by the husband or father, as by his antecedent or contemporaneous declaration that the wife or child was merely intended to be a trustee.(h)

A purchase by a married woman out of her separate estate in the name of her child does not, it seems, without proof of intention, raise a presumption of advancement. But it seems otherwise in the case of a widowed mother.(i) And possibly 45 & 46 Vict. c. 73, s. 21, by rendering a married woman having separate estate liable for the maintenance of her children, may have weight in any future decision hereon.

Operative Words.—After the receipt of the consideration the operative words of alienation, covenant or otherwise, follow.

The word “grant” in a conveyance of freeholds was a word of the most general effect; and the 8 & 9 Vict. c. 106, s. 4, enacts that corporeal tenements or hereditaments may be conveyed by deed of grant, as already (k) shown. But by 44 & 45 Vict. c. 41, the use of the word “grant” is not necessary to convey tenements or hereditaments, corporeal or incorporeal (sect. 49), as already stated. And under sect. 2 (v.) the word “convey” is made sufficient to pass both freehold and leasehold property; but as to leaseholds, the word “assign” is usually used.

The Parcels.—The parcels, or description of the property dealt with,

(a) See Story's Eq. sects. 1201, 1201a; *Dyer v. Dyer*, 1 L. C. Eq. 236, 244, 6th edit.; 2 *Id.* 803, 7th edit. Lewin, Trusts, 174, 175, 179, 10th edit.

(b) See Lewin, Trusts, 179, 180, 10th edit.; Dart's V. & P. 1055, 1056, 6th edit.; *Dyer v. Dyer*, 1 L. C. Eq. 247, 6th edit.; 2 *Id.* 814, 7th edit.

(c) *Rider v. Kidder*, 10 Ves. 364; *Dyer v. Dyer*, 2 L. C. Eq. 817, 7th edit.; Lewin, Trusts, 181, 10th edit.

(d) Lewin, Trusts, 177, 178, 10th edit.; *Dyer v. Dyer*, sup., p. 812, 7th edit.

(e) *Glaister v. Hower*, 8 Ves. 199; *Re Eykyns*, 6 Ch. Div. 115.

(f) *Dyer v. Dyer*, sup.; Lewin, Trusts, 182, 10th edit.

(g) *Kilpin v. Kilpin*, 1 My. & K. 542; Lewin, Trusts, 189, 10th edit.

(h) *Dumper v. Dumper*, 6 L. T. Rep. N. S. 315; 3 Gif. 583; *Dyer v. Dyer*, sup.; *Jeans v. Cook*, 24 Beav. 513.

(i) See *Dyer v. Dyer*, 1 L. C. Eq. 256, 257, 6th edit.; 2 *Id.* 821, 7th edit.; *Batstone v. Salter*, 10 Ch. App. 431; Lewin, Trusts, 190, 10th edit.

(k) *Ante*, p. 122.

usually follow the operative words. This description may be express and independent, or be by reference to a recital, or to a schedule in the deed. A common instance of a description of the parcels in a recital occurs in an assignment of a lease, or term of years, when in reciting the indenture of lease the parcels are set forth as described in the lease, and are afterwards assured in the operative part by reference.(a)

The parcels are usually copied from the latest description in the abstract of title; but if a new description becomes necessary from alterations in the property, the identity of the new with the old description must be preserved by a suitable reference. If the instrument containing the old description be recited, the recital should refer to the new description in the operative part; but if not recited, it is usual, in the operative part, to set out the modern description by which the property has been bought, and follow it by the ancient description, with the introductory words, "All which said hereditaments and premises were formerly known and described as follows (that is to say)".(b)

Where property consisting of several pieces of land, or of several houses, is conveyed, it is usual to describe the property in the deed in general terms, and add that it is more particularly described in a schedule to the deed; and the schedule may be made to refer to a plan by distinguishing numbers. Where this course is adopted, special care should be taken to make the description in the schedule definite and precise, and to see that there is no inconsistency between the description in the body of the deed and the schedule.(c)

Where lands of freehold and copyhold tenures become so blended together that they cannot be distinguished, it is usual to grant "all such and so many and such part or parts as are of freehold tenure of the hereditaments and premises hereinafter described, that is to say," followed by the proper description of the blended property. The covenant to surrender the copyholds is for "all such," &c., "as are of copyhold or customary tenure of the said hereditaments and premises hereinbefore described, and the freehold parts whereof are hereinbefore granted." Where leaseholds are undistinguishably intermixed with freeholds or copyholds a similar mode is adopted.(d)

A remainder or reversion is properly conveyed by describing it as if it were in possession, but subject nevertheless to the prior estate, and not by describing it as a remainder or reversion, for it is said that a remainder or reversion, if conveyed as such, will not pass unless described with strict accuracy.(e)

(a) 1 David. Conv. 79, 81, 4th edit; 60, 61, 5th edit; 5 Byth. & Jarm. Conv. 176, 4th edit.; 1 Prid. Conv. 230, n., 16th edit.; 282, 17th edit.

(b) 1 David. Conv. 62, 63, 5th edit.; see also 5 Byth. & Jarm. Conv. 173, 4th edit.

(c) 5 Byth. & Jarm. Conv. 167, 4th edit.; 1 David. Conv. 85, 4th edit.; 64, 5th edit.

(d) 1 David. 86, 4th edit.; p. 66 5th edit.; 1 Prid. Conv. 220, 16th edit.; 222, 17th edit.

(e) 1 David. Conv. 87, 4th edit.; p. 67, 5th edit.; Byth. & Jar. 175, 4th edit.

With reference to an improper description of the parcels, the maxim *falsa demonstratio non nocet* applies, which means that as soon as there is an adequate and sufficient description with convenient certainty of what is intended to pass by a deed, a subsequent addition of a wrong name, or of an erroneous statement as to quantity, occupancy or locality, will not vitiate it.(a)

“Parcel or no parcel” is a question of fact for a jury, but the presiding judge is bound to tell the jury what is the proper construction of any document necessary to be considered in the decision of that question.(b)

Particular Words.—Certain words used in the parcels have certain defined meanings: thus the word *manor* will pass all the demesne lands thereof, and the freehold of the copyhold thereof, as well as the seigniorship.(c)

The word *messuage*, though ordinarily used as synonymous with dwellinghouse, will pass a house and curtilage, garden, &c.(d)

The word *farm* includes the farmhouse and all the lands held therewith.(e)

So *land* includes not only land in its ordinary sense, but houses and buildings thereon, and mines and minerals thereunder, the maxim being *cujus est solum, ejus est usque ad celum, et ad inferos*.(f) But see *ante*, p. 92, *et post*, as to when mines do not pass.

Tenement comprises not only land, but every subject of tenure, whether corporeal or incorporeal.(g)

Hereditament is a word of the largest signification, and extends to everything that may be inherited, corporeal or incorporeal, real or personal.(h)

The word *water* will not pass the land on which it stands, but only the fishing therein. If it is wished to pass the land also it must be described as “that piece of land covered with water.” It is said, however, that the word “pool” includes not only the water, but the land on which the water stands.(i)

It has already (*ante*, p. 53) been shown that standing timber and fixtures will, as a general rule, pass with the property conveyed without being specially mentioned.

General Words.—After the description of the parcels, it was, prior to the Conveyancing Act, 1881, the usual practice to add a clause by which the grantor purported to include in his grant all such parts of the property as were not usually described with minute accuracy in the parcels, and also all easements, rights, and liberties which belonged to him at the date of the grant, as appurtenant to the property.(k)

(a) Dart's V. & P. 602, 6th edit.

(b) *Lyle v. Richards*, L. R. 1, H. L. Cas. 222; 35 L. J. 214, Q. B.

(c) Co. Lit. 5, a; 2 Bl. C. 53.

(d) Co. Lit. 5, b.

(e) Co. Lit. 5, a; *Holmes v. Milward*, 47 L. J. 522, Ch.; 26 W. R. 608.

(f) Co. Lit. 4, a; Whart. L. Lex.

(g) Co. Lit. 6, a.

(h) Co. Lit. 6 a.

(i) Co. Lit. 4b., 5b.; 5 Byth. & Jarm. 176, 4th edit.

(k) 5 Byth. & Jarm. Conv. 185, 4th edit.; 1 David. Conv. 71, 5th edit.

These were called "general words," and the chief object of inserting them was to prevent any question arising as to whether a particular easement or right would or would not pass without those words. In the large majority of cases the words may be useless, in a few isolated cases some, or one, of them might be required.(a)

By 44 & 45 Vict. c. 41, s. 6 (1, 4, 6), in future a conveyance of land will, unless a contrary intention is expressed therein, operate to convey with the land all buildings, erections, fixtures, commons, fences, ditches, ways, waters, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land, or any part of it, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land, or any part thereof.

And by sub-sects. 2, 4, 6, a conveyance of land having houses, or other buildings thereon, will, in future, unless a contrary intention is expressed therein, include and convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, cisterns, sewers, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed, or known, as part or parcel of or appurtenant to the land, houses, or other buildings conveyed, or any of them, or any part thereof.

The above section is not to be construed as giving to any person a better title to any property, right, or thing mentioned in it, than the title which the conveyance gives to him to the land expressed to be conveyed; or as conveying to him any property, right, or thing mentioned in the section, further or otherwise than as the same could have been conveyed to him by the conveying party (sub-sect. 5).

This section does away with the necessity for general words following the description of the parcels.

Rights of common and rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed to land they would, even before the above enactment, pass by a conveyance of the land without mention of the appurtenances. But if such rights, though usually enjoyed with the land, should not be strictly appurtenant to it, a conveyance of the land merely with its appurtenances without mentioning the rights of common or way, would not be sufficient to comprise them.(b)

A conveyance since the above Act will operate to pass reputed easements, if the Act alone is relied upon, but it has been held on the construction of sect. 6 (sub-sects. 1, 2, 4), that under a contract for the sale of land "with the appurtenances" the purchaser is only entitled to have such general words inserted in his conveyance as he would have been entitled to before

(a) Wolst. & B. Conv. 28, 7th edit.; *et post*, p. 133.

(b) Will. R. P. 330, 331, 13th edit.

the Act; and if the general words implied by sect. 6 are more extensive than the contract the vendor is entitled to have them limited accordingly.(a)

Prior to the Conveyancing Act, 1881, it was held that by the grant of part of a tenement there passed to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith, if there be nothing in the conveyance to negative the presumption(b); as for instance, an absolutely necessary right of way,(c) or of drainage.(d)

On the other hand, there is no corresponding implication in favour of the grantor; though there are certain exceptions to this, as in the case of a way of necessity.(e)

It will be noticed that mines and minerals are omitted from the general words which, by sub-sects. 1 and 2 of sect. 6, are made applicable to land and houses, for they pass under a conveyance of freehold land without being expressly mentioned, as do the houses above, the maxim being *cujus est solum, ejus est usque ad celum et ad inferos*.(f) But in copyhold or customary lands, mines and minerals belong to the lord of the manor, and do not therefore pass under an assurance of such lands by a copyholder.(g)

Mines and minerals are also excepted from conveyances of lands to a railway company, under the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), and to a water works company under the Water Works Clauses Act (10 Vict. c. 17), to the effect already (ante, p. 92) detailed. But by sub-sects. 3, 4 of sect. 6 of 44 & 45 Vict. c. 41, on a conveyance of a manor, mines and minerals are included therein, unless expressly reserved or excepted. As to mines and minerals under land registered under the Land Transfer Acts, see post, that title.

All Estate Clause.—This clause formerly followed the general words. It was used on the alleged ground that it was necessary to pass any outstanding estate or interest which might happen to be vested in any of the conveying parties, distinct from the estate or interest which such party purported to convey.(h) However, by 44 & 45 Vict. c. 41, s. 63, after the 31st December, 1881, and so far as a contrary intention is not expressed in the conveyance, every conveyance shall be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying

(a) *Re Peck and London School Board* (1893), 2 Ch. 315; 62 L. J. 598, Ch.; 68 L. T. Rep. N. S. 847; 41 W. R. 388.

(b) *Wheeldon v. Burrows*, 12 Ch. Div. 31; 48 L. J. 853, Ch.; 41 L. T. Rep. N. S. 327; 28 W. R. 196; Dart's V. & P. 608, 6th edit.

(c) *Barkshire v. Grubb*, 18 Ch. Div. 616; *Gayford v. Moffatt*, 4 Ch. App. 133; Dart, *sup.*

(d) *Ewart v. Cochrane*, 4 Macq. 117; 5 L. T. Rep. N. S. 1; 10 W. R. 3.

(e) *Wheeldon v. Burrows*, *sup.* (f) Will. Real Pro. 14, 13th edit.

(g) Scriv. Cop. 18, 7th edit.; see also 57 & 58 Vict. c. 46, s. 23; *et post*, tit. "Copyholds."

(h) 1 David. Conv. 93, 94, 4th edit.; p. 73, 5th edit.; 5 Byth. & Jarm. Conv. 196, 4th edit.

parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

This section renders the "all-estate" clause unnecessary. Before the Act, an express all-estate clause in a lease could not pass the fee for want of the word "heirs," also because the premises would be controlled by the habendum; and although by sect 2 (v.) of the Act, "conveyance" includes a lease, it is conceived that even if the word "convey" were used in the lease, this does not alter the law on this point.(a)

Exceptions and Reservations.—Any exceptions or reservations intended to be made out of the conveyance should properly be inserted immediately after the parcels. An exception must be of *part* only of the thing granted, and not of any other thing; as of a field, or of mines or minerals. It must not be repugnant to the grant. Thus on a grant of land, an exception of the pasturage is void.(b)

A reservation is of some right issuing out of the thing granted; such as a right of way, or a rent. Like an exception, it must be consistent with the grant. It may, however, in some cases be implied: for though a grant is construed most strongly against the grantor, yet where a right in the land granted is absolutely necessary for the beneficial enjoyment of property retained, the grantor must be presumed to have reserved it to himself.(c) As if he sell three out of four fields lying together, keeping the middle one, and the only way to it is over one of those sold, the law reserves to him such a right. This implied right is said to operate by way of regrant from the grantee of the land rather than as a reservation. It is, however, limited by the necessity which created it.(d)

5. *The Habendum.*

The habendum follows the parcels, or the exceptions and reservations, if any, and limits or defines the estate granted: as to hold to the grantee for life or in tail or in fee simple.

It is said that generally speaking no person can take an *immediate* estate in the habendum if not named in the premises; but may take an estate in remainder. And if no person is named in the premises, one who is first named in the habendum may take an immediate estate. No new subject matter can be added in the habendum; thus, if there be a grant of Blackacre, and in the habendum Whiteacre is added, the habendum is void as to Whiteacre.(e)

(a) See Wolst. & B. Conv. 117, 7th edit.; 5 Byth. & Jar. Conv. 199, n. 4th edit.; 1 David. Conv. 74, 5th edit.

(b) 5 Byth. & Jar. Conv. 177, 4th edit.; 1 David. Conv. 75, 5th edit.

(c) 5 Byth. & Jar. Conv. 180, 181, 4th edit.

(d) *Corporation of London v. Riggs*, 13 Ch. Div. 798; 49 L. J. 297, Ch.; 42 L. T. Rep. N. S. 580; 28 W. R. 610; and see *ante* p. 133, *et post*, tit. "Leases."

(e) 5 Byth. & Jar. Conv. 200, 205, 4th edit.; 1 David. Conv. 80, 5th edit.

The habendum may qualify or enlarge, but it cannot abridge the estate granted by the premises. Thus, if an estate be granted to A. and his heirs, habendum to him for life, the habendum is void. But if granted to A. and his heirs, habendum to him and the heirs of his body, he only takes an estate tail, as the habendum qualifies the grant and shows what heirs were intended.(a)

Until the operation of the Conveyancing Act, 1881, the word "heirs" was necessary in a deed to create an estate in fee simple; and the words "heirs of the body" to create an estate tail. By sect. 51 of the Act it is provided that in a deed executed after the operation of the Act it is sufficient in the limitation of an estate in fee simple to use the words in fee simple, without the word heirs. And in the limitation of an estate in tail it is sufficient to use the words in tail, without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female, as the case requires, without the words heirs male of the body or heirs female of the body.

However, on a conveyance *inter vivos* of land without the word "heirs" (or the equivalent words under the above section), only an estate for life will pass to the grantee.(b)

The Uses.—The uses upon which the property is to be held are next declared. If before the Statute of Uses (c) a conveyance was made to another without any consideration, or any declaration of a use, equity presumed that the grantor meant it to the use of himself, and, therefore, raised an implied use for his benefit, termed a resulting use. And after the operation of the Statute of Uses, he immediately got back all he had conveyed.(d) To prevent this undesirable result it became the practice in a conveyance, whether made for a consideration or not, to limit the property to uses which practically vest the estate in the purchaser.(e)

Where a use is declared, it is necessary to raise a use under the Statute of Uses, that the person seised to the use should be distinct from the *cestui que* use; as the statute says "where any person stands seised to the use of *another* person," &c. In an ordinary purchase deed, however, this is not done, the conveyance being made unto and to the use of the purchaser and his heirs; and it operates as a common law conveyance, and not as a conveyance under the statute. Yet after the declaration of use to the purchaser, he has not only a seisin but a use, although not the use which the statute requires, and therefore that seisin, which before the limitation of the use to himself was open to serve uses declared to some other person, is by the limitation filled up, and will not admit

(a) 5 Byth. & Jar. Conv. 201, 4th edit.; 1 David. Conv. 81, 82, 5th edit.; but see *Burchell v. Clarke*, 2 C. P. Div. 88.

(b) *Re Hudson*, 72 L. T. Rep. N. S. 892.

(c) *Ante*, p. 122.

(d) Will. R. P. 160, 190, 13th edit.

(e) Will. R. P. 160, 163, 190, 13th edit.; 1 David. Conv. 182, pt. 1, 4th edit.; p. 176, 3rd edit.

of any other use being limited on it (a); for soon after the Statute of Uses it was established that a use could not be limited upon a use; so that the fee is by this conveyance vested in the purchaser.(b)

The word "use" is not necessary to raise a use under the statute, for the statute mentions the words "use, trust, or confidence," any of which is, therefore, sufficient; but in conveyances the word use is generally employed.

Thus, in the case of a grant to B. and his heirs to hold to the use of (or in trust for) C. and his heirs both the legal and equitable estate in fee simple are vested in C. by force of the Statute of Uses; and any further use limited after the use to C. would not be executed by the statute, but remain a mere trust to be enforced in equity.(c)

By means of the Statute of Uses and a seisinee to uses, a man was enabled by one deed to convey a freehold estate to himself, or to his wife, which, prior to the statute he could not do, as he could not be both grantor and grantee, two deeds being necessary, one for the purpose of his conveying the property to a third person, and another for the reconveyance by such third person.(d)

And as the Statute of Uses cannot operate on a leasehold for years, prior to 22 & 23 Vict. c. 35, the plan of two deeds was adopted under similar circumstances in regard to the leaseholds.(e)

Sect. 21 of the above statute, however, provides that a person may assign personal property, including chattels real, directly to himself and another person or corporation by the like means as he might assign the same to another.

And by 44 & 45 Vict. c. 41, s. 50, freehold land or a thing in action may since the commencement of the Act be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another.(f)

These two statutes apply to a conveyance in joint tenancy, as in the ordinary case of the appointment of a new trustee.(g)

Dower Uses.—These uses are only necessary in a conveyance to a purchaser who married before the 2nd January, 1834, as the 3 & 4 Will. 4, c. 105, places the dower of women married after 1st January, 1834, in the power of their husbands; no widow being entitled to dower out of any land which has been absolutely disposed of by the husband in his lifetime, or by his will. And all partial estates, &c., created by the husband, and all his

(a) 2 David. Conv. 183, pt. 1, 4th edit.; *Orme's Case*, L. R. 8 C. P. 281: 42 L. J. 38, C. P.; 27 L. T. Rep. N. S. 652; 21 W. R. 171.

(b) *Tyrrell's Case*, Tud. L. C. C. 251; Will. R. P. 162, 163, 13th edit.

(c) *Tyrrell's Case*, sup., Will. sup.

(d) 2 David. Conv. 184, pt. 1, 4th edit.; Wills. R. P. 191, 13th edit.

(e) 2 David, sup.

(f) As to transactions between husband and wife, see post, tit. "Settlements."

(g) See Wolst. & B. Conv. 107, 7th edit.

debts, &c., are effectual against the widow's right to dower. The husband may also bar her right to dower, either wholly or partially, by any declaration for that purpose made by him, by any deed executed by him, or by his will (sects. 4 to 7). And as a consequence of this statute it has been the practice of many solicitors on a purchase by a client married since the operation of the Act, to insert in the purchase deed a declaration that no widow of the purchaser shall be entitled to dower. This practice is wrong, because if the purchaser does not dispose of the property in his lifetime and dies intestate, there is no reason why the widow's dower should be defeated in favour of the heir-at-law, even if a child, and especially not if a distant relative.(a)

If the purchaser was married before the above date, now becoming a rare event, the conveyance to him must be made to the usual dower uses if he wishes to prevent his wife's right to dower attaching. The mode is to limit the habendum to such uses as the purchaser shall appoint; and in default of, and until such appointment, to the use of him for life without impeachment of waste, and after the determination of his life interest by any means in his lifetime, a remainder (vested) is limited to the use of a trustee during the purchaser's life, and in trust for him, followed by an ultimate remainder to the heirs and assigns of the purchaser. Here dower cannot attach, for the purchaser has not at any time during his life an estate of inheritance *in possession*; for at common law, dower attaches only on legal estates of inheritance in possession of which the husband was solely seised at any time during the coverture and of which any issue the wife might have had might have inherited. But when it once attached it prevailed against his conveyances or testamentary dispositions.(b)

No arrears of dower, or any damages on account of such arrears can be recovered by action for a longer period than six years next before the commencement of such action.(c)

A decree for a dissolution of the marriage destroys the right to dower, even if such decree is obtained at the suit of the wife.(d)

And by 3 & 4 Will. 4, c. 105, if the husband devises any land to his widow out of which she would be dowable if the same had not been so devised, or any estate or interest therein for her benefit, her right to dower is thereby destroyed in respect of any land of her husband, unless the will provides to the contrary (sect. 9).

But no gift by him to her of personal estate or of land *not* liable to dower will defeat her right to dower, unless a contrary intention be declared by his will (sect. 10). It has been held, however, that the gift to the widow of the income of part of the proceeds of the husband's real estate directed to be sold, is a gift to her of an "interest in land" within sect. 9, and bars her right to dower.(e)

(a) 1 Prid. Conv. 225, 14th edit.; 2 David. Conv. 186, pt. 1, 4th edit.

(b) 2 David. Conv. 185, pt. 1, 4th edit.

(c) 3 & 4 Will. 4, c. 27, s. 41.

(d) *Frampton v. Stevens*, 21 Ch. Div. 164.

(e) *Lacey v. Hill*, L. E. 19 Eq. 346; 44 L. J. 215, Ch.; *Thomas v. Howell*, 34 Ch. Div. 166; 56 L. J. 9, Ch.

A woman married after 1st January, 1834, is entitled to dower out of *equitable* as well as legal estates of inheritance of which her husband dies possessed, not being in joint tenancy (sect. 2); therefore the dower uses would not bar her right without an express declaration. And as by sect. 14 the Act is not to give to any will, deed, &c., executed *before* the 1st January, 1834, the effect of defeating a right to dower, a limitation to dower uses in a deed executed before that date, will not bar the dower of a woman *married after* that date whose husband dies intestate.(a)

6. The Covenants.

A covenant is an agreement under seal, that is by deed.(b) No precise form of words is necessary to constitute a covenant; it is enough if the intention of the parties mutually to contract is apparent from the instrument; as where it says "it is hereby agreed by," &c.(c) A covenant is to be construed most strongly against the covenantor.(d)

It was a rule of law that in the case of a deed *inter partes*, an action thereon must be brought by a party thereto.(e) To this rule there are several exceptions, thus by 32 Hen. 8, c. 34, in a demise of land containing a covenant touching the thing demised, an assignee of the reversion may sue on the covenant. So where a covenant runs with the land (see *post*) an assignee or grantee may sue upon it. And by 8 & 9 Vict. c. 106, s. 5, where a covenant relating to any tenements or hereditaments is contained in a deed executed after 1st Oct., 1845, it may be sued upon by a person not a party to the deed. Other exceptions have been made by 44 & 45 Vict. c. 41, which will be treated of in subsequent pages.

Covenants are either express or implied. Formerly the word "give" and the word "grant" in certain cases implied covenants for title. By 8 & 9 Vict. c. 106, it is provided that the word give or the word grant in a deed executed after 1st Oct., 1845, shall not imply any covenant in law in respect of any tenements or hereditaments, unless made to do so by some Act of Parliament (sect. 4). By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 132, in conveyances of lands by the promoters of the undertaking the word "grant" implies covenants for title.

The words "yielding and paying" in a lease create an implied covenant for payment of rent, unless there be an express covenant for payment.(f) So the word "demise" in a lease for years under seal creates a covenant for quiet enjoyment; and it seems also for good title.(g) An express covenant qualifies or restrains an implied covenant.(h)

(a) *Fry v. Noble*, 20 Beav. 598; 7 De G. M. & G. 687.

(b) *Holles v. Carr*, 3 Swan. 647.

(c) *Wood v. Copper Miners Co.*, 7 C. B. 906; 18 L. J. 292, C. P.

(d) *Wards v. Wards*, 16 Beav. 103.

(e) Chit. Cont. 55, 11th edit.

(f) Woodf. L. & T. 534, 13th edit.; 569, 16th edit.; 1 David. Conv. 86, 5th edit.

(g) Woodf. L. & T. 674, 13th edit.; 718, 16th edit.; *Baynes v. Lloyd* (1895), 2 Q. B. 610; 64 L. J. 787, Q. B.; 73 L. T. Rep. N. S. 250

(h) 1 David. Conv. 106, 4th edit.; 85, 5th edit.

And an implied covenant determines with the estate and interest of the lessor (a); but we shall treat more fully on this subject subsequently under the head of "Leases."

Covenants may also be joint and several. If there be two or more covenantors, or two or more covenantees, the liability or benefit arising under the covenant may either be joint or several, or both joint and several, according to the intention of the parties, which should properly be clearly expressed in the instrument.(b)

A covenant with two and every of them has been held to be joint, though the two are several parties to the deed.(c)

However, the rule as to joint and several covenants is one merely of construction; and parties may by apt words covenant severally, although there is a joint interest. If the words are capable of two constructions, then the legal construction will depend upon the nature of the interest.(d) It is not a settled rule of equity that every contract, which is in terms joint, shall be considered in equity joint and several.(e) As to parties to sue and be sued, Order 16, of R.S.C., has made provision for remedying the nonjoinder or misjoinder of parties.

Joint tenants are seized, *per me et per tout*, yet for the purpose of, a grant or demise each of them hath but a right to a moiety.(f) Therefore, when they sell as beneficial owners, it is proper to make each convey a moiety, thereby limiting to a moiety his liability under the statutory covenant for title under the Conveyancing Act, 1881.(g) And prior to this Act, there was an objection to making their express covenants on a sale joint instead of several, as if joint the whole burden ultimately falls upon the survivor. Tenants in common on a sale covenanted severally, being restricted to their several undivided shares; and since the above Act, the covenants arising thereunder should likewise be restricted.(h)

As will be shown more fully, *post*, by the Conveyancing Act, 1881, s. 60, covenants made with two or more jointly to do an act for their benefit, gives the survivors or survivor the benefit of the covenant.

When a mortgagor concurs in a sale by the mortgagee, the mortgagor gives the ordinary covenants for title, which supersede the absolute covenants in the mortgage deed(i); the mortgagee merely covenanting that he has done no act to encumber the property.

Covenants may be real or personal. The former relate to real property, or something annexed thereto, and run with the land. On the other

(a) *Penfold v. Abbott*, 32 L. J. 67, Q. B.; 7 L. T. Rep. N. S. 384.

(b) 1 David. Conv. 113, 4th edit.; 91, 5th edit.; 5 Byth. & Jar. 213, 4th edit.

(c) *Bradburne v. Botfield*, 14 M. & W. 559; 14 L. J. 330, Ex.

(d) *Keightley v. Watson*, 3 Ex. 716; 18 L. J. 339, Ex.

(e) *Kendall v. Hamilton*, 3 C. P. Div. 403; 4 App. Cas. 504; 48 L. J. 705, C. P.

(f) Co. Lit. 186, a; 1 St. Com. 330, 12th edit.

(g) 1 Prid. Conv. 278, 14th edit.; 272, 17th edit.; Dart's V. & P. 624, 6th edit.; *Sutton v. Baillie*, 65 L. T. Rep. N. S. 528.

(h) 1 David. Conv. 119, 4th edit.; 96, 5th edit.; Dart, *sup*.

(i) Dart's V. & P. 624, 6th edit.

hand, personal covenants do not run with the land, but the benefit or burden goes with a particular person; as a covenant by A. to pay to B. 100l.(a)

Covenants running with the land.—A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. In this respect covenants may be divided into (1) those between lessor and lessee, and (2) those between vendor and purchaser. As to the former, we shall hereafter treat of them under the head of "Leases." As to the latter, they are (A) covenants made *with* the owner of the land (by the vendor), and (B) covenants made *by* the purchaser or owner of the land, as where he covenants not to build.

The *benefit* of a covenant made with the owner of the land will run with the land to each successive transferee if (1) it directly relates to the land transferred, and (2) if the covenantee, at the time of the making of the covenant, has the land to which it relates, and (3) if the transferee is in possession of the same estate in the land which the original covenantee had. Thus, covenants for title run with the land.(b) So the covenants implied under sect. 7 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), run with the land (sect. 7, sub-sect. 6).

But in cases other than between lessor and lessee, it seems that the *burden* of a covenant not involving a grant does not at law run with the land.(c) However, if a purchaser enters into a covenant which is restrictive of the use of the land, equity will restrain not only the covenantor, but also anyone who takes the land with notice of the covenant, from breaking it, although strictly speaking, the covenant may not run with the land.(d)

However, equity will not enforce a covenant against an assignee of the covenantor (not being between landlord and tenant) involving the expenditure of money, as to build or repair.(e)

Restrictive covenants are generally used to prevent purchasers of different lots of an estate parceled out for building purposes, from doing acts that would depreciate the estate. And where for this purpose there is a defined scheme and an arrangement that the several purchasers shall enter into restrictive covenants for their mutual benefit, then the covenants, though expressed to be entered into with the vendor only,

(a) 1 David. Conv. 110, 4th edit.; 88, 5th edit.

(b) *Spencer's Case*, 1 Sm. L. C. 87, *et seq.*, 9th edit.; Dart's V. & P. 865, 878, 6th edit.

(c) *Austerberry v. Oldham*, 29 Ch. Div. 750; 53 L. T. Rep. N. S. 548, 55 L. J. 663, Ch.; 33 W. R. 807, C. A.; Dart's V. & P. 862, 6th edit.

(d) *Tulk v. Moshay*, 2 Phil. 774; *Wilson v. Hart*, 1 Ch. App. 463; 35 L. J. 569, Ch.; 14 L. T. Rep. N. S. 499; 14 W. R. 748; *London and South-Western Railway Company v. Gomm*, 20 Ch. Div. 562; 51 L. J. 530, Ch.; 46 L. T. Rep. N. S. 449; 30 W. R. 620.

(e) *Haywood v. Brunswick, &c., Company*, 8 Q. B. Div. 403; 51 L. J. 73, Q. B.; 45 L. T. Rep. N. S. 699; 30 W. R. 299; *London and South-Western Railway Company v. Gomm*, *sup.*

will be mutually enforceable in equity by and against all parties who come in as purchasers under the scheme; and this is so, though some of the lots are not sold at the first sale, but are subsequently sold subject to the same conditions.(a)

However, whether the covenants are intended for the mutual benefit of all the purchasers, or for the benefit and protection of the vendor only, is a question of intention to be determined from the circumstances of each particular case. If the restrictions seem simply intended for the benefit of the vendor, purchasers of other plots of land from him cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit. If the sale is intended to comprise the whole of the vendor's estate, in lots, the presumption in favour of the purchasers would arise, although the whole of the lots may not be sold at the same time.(b)

In these cases, in order to prevent disputes arising, often ending in costly litigation, it is advisable, where it is intended that the covenants should be enforceable by the vendor and also by the purchasers *inter se*, either to have a general deed containing such covenants executed by the vendor, and by each purchaser as he completes; or to insert in the conveyance to each purchaser, not only covenants by him with the vendor, but also a declaration that he shall be entitled to the benefit of the similar covenants entered into by the other purchasers, and as regards any lots not already sold and conveyed, the same shall be subject to the like restrictions.(c)

It is not unusual in these cases for the vendor to have a model form of conveyance prepared, and to offer it to purchasers at a moderate specified charge, or even free of any charge.

Where lands are conveyed to uses, covenants in order to run with the land should be entered into with the grantee to uses.(d)

Covenants for Title.—Until the commencement of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it was the practice to insert in every conveyance of freeholds the covenants for title specified, *ante*, p. 82, *et post*. Since the commencement of this Act, however, express covenants for title are no longer necessary, for on stating the character in which a person conveys, the proper covenant by him is to be deemed to be included and implied in the conveyance, so far as regards the subject matter or share of the subject matter expressed to be conveyed by him.(e)

(a) See *Renals v. Cowlishaw*, 9 Ch. Div. 125; 11 Id. 866; 38 L. T. Rep. N. S. 503; 26 W. R. 754; *Collins v. Castle*, 36 Ch. Div. 243; 57 L. J. 76, Ch.; *Mackenzie v. Childers*, 43 Ch. Div. 265; 59 L. J. 118, Ch.

(b) *Nottingham Brick and Tile Co. v. Butler*, 15 Q. B. Div. 261; 16 Id. 778; 54 L. J. 544, Q. B.; 55 Id. 280.

(c) See 1 Prid. Conv. 201, 16th edit.; and forms, pp. 393, 395; 5 Byth. & Jar. Conv. 483, 4th edit.

(d) 1 Prid. Conv. 198, 16th edit.; 200, 17th edit.; Dart's V. & P. 878, 6th edit. Byth. & Jar. Conv. 279, 4th edit.

(e) 44 & 45 Vict. c. 41, s. 7, sub-s. 1.

In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is *expressed* to convey as *beneficial owner* is implied (to the following effect): That notwithstanding anything by the person who so conveys, or anyone through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, he has, with the concurrence of every other person, if any, conveying by his direction, power to convey the subject matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and that notwithstanding anything as aforesaid, the subject matter shall be held and enjoyed for quiet enjoyment thereof; and that freed from all incumbrances; and for further assurance. Purchase for value is not to include a conveyance in consideration of marriage.(a)

The expression "purchase for value" is not to include, it will be noticed, a conveyance in consideration of marriage; as a settlor usually gives a limited covenant only, as will be shown in a subsequent chapter. Therefore a person deriving title under a marriage settlement should, on selling, covenant as to the acts of the settlor as he would if he were an heir-at-law covenant for the acts of his ancestor.(b)

And in a conveyance in fee where the vendor conveys as "beneficial owner," the covenants for title thereby implied run with the land, and in an action thereon the original covenantor cannot, as against a *bond fide* purchaser for value without notice, avail himself of the defence that the breach was induced by the fraud of the original covenantee. But these implied covenants are controlled throughout by the words, "that notwithstanding anything by the person who so conveys," &c.(c)

In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner is implied (to the following effect): That notwithstanding anything by the person who so conveys, or anyone through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed, is a good, valid, and effectual lease, &c., and is in full force, unforfeited, unsurrendered, not void or voidable, and that the rents reserved by, and the covenants, &c., contained in, the lease or grant, on the lessee's or grantee's, &c., part have been paid, observed, and performed. Purchase for value is restricted as in the previous clause (see 44 & 45 Vict. c. 41, s. 7, sub-s. 1, B).

It will be observed that this section also speaks of "a person who conveys and is expressed to convey as beneficial owner." And see sub-sect. 4.

The Act does not imply a covenant of indemnity against the rent and

(a) See the covenant *in extenso*, sect. 7, sub-sect. 1 (A), 44 & 45 Vict. c. 41.

(b) Wolst. & B. Conv. 33, 7th edit.

(c) *David v. Sabin* (1893), 1 Ch. 523; 68 L. T. Rep. N. S. 237; 62 L. J. 347, Ch.; 41 W. R. 398, C. A.

covenants in the lease, on an assignment of the lease.(a) If such a covenant is desired by a vendor, it should be inserted in the deed of assignment, and the deed must be executed by the purchaser.(b) We shall, however, again refer to this point subsequently, tit. "Leases."

By sect. 7 (1), F., where the person who conveys and is expressed to convey as trustee, or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, so found by inquisition, or under an order of the Court, a covenant extending to every such person's own acts only is implied, that the person so conveying has not executed or done or knowingly suffered, or been party or privy to any deed or thing whereby the subject matter of the conveyance, or any part thereof, is incumbered, &c.

And by sub-sect. 2, where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within sect. 7, the person giving the direction, whether he conveys, and is expressed to convey as beneficial owner or not, is to be deemed to convey and to be expressed to convey as beneficial owner the subject matter so conveyed by his direction; and a covenant on his part is to be implied accordingly.

Under sect. 7 (2) the covenant implied on the part of the person directing applies to what another conveys by his direction, as where there is a sale by trustees under a power, by the direction of the tenant for life. Since the Settled Land Act, 1882, however, the tenant for life himself will generally be the vendor. (See *post*, tit. "Settlements.")

When the trustees convey by the direction of the tenant for life the modern practice is to confine his covenants to his life estate only.(c)

And where trustees are so selling, a condition that "the vendors being trustees are to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees," will not deprive the purchaser of his right to the usual limited covenants for title, by the tenant for life.(d)

Some further remarks on covenants for title entered into by trustees for sale and by the person beneficially interested in the proceeds of the sale, will be found stated *ante*, pp. 29, 52, 125.

Where a person enters into a contract of sale and afterwards becomes a lunatic, and the judge in lunacy orders his committee to perform the contract, or to sell any property of the lunatic, and to execute the conveyance, it seems the committee may be authorised to bind the lunatic by entering into the ordinary covenants for title.(e)

(a) As to the protection afforded to executors and administrators on an assignment of a lease of their deceased testator or intestate, see 22 & 23 Vict. c. 35, s. 27, *et post*, tit. "Leases."

(b) Wolst. & B. Conv. 34, 7th edit.

(c) See Dart's V. & P. 620, 6th edit.; 2 David. Conv. 261, n. 262, 4th edit.; *Re Sawyer and Baring's Contract*, 51 L. T. N. S. 356; 53 L. J. 1104; 33 W. R. 26.

(d) *Re Sawyer and Baring's Contract*, *sup*.

(e) See 58 Vict. c. 5, ss. 120, 124; *Re Ray*, 65 L. J. 316, Ch. 73 L. T. Rep. N. S. 723; (1896) 1 Ch. 468; C. A.; *et ante*, p. 13.

It seems to be the general practice that a land owner selling land to a railway or other similar company must enter into the usual covenants for title (a); which he now does by conveying as beneficial owner.(b)

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 16 (3), in the absence of special stipulation, a vendor of land registered with an absolute title cannot be required to enter into any covenant for title; and a vendor of land registered with a possessory or qualified title can only be required to covenant against estates and interests excluded from the effect of registration; and the implied covenants under the Conveyancing Act, 1881 (*ante*, p. 142), are to be construed accordingly.

By the Land Transfer Act, 1875, s. 39, however, on a transfer of leasehold land under the Act, unless negatived by an entry on the register, there is an implied covenant on the transferor's part with the transferee that, notwithstanding anything by the transferor done or knowingly suffered, the rent and covenants in the registered lease to be paid and performed by the lessee have been so paid and performed. But these points will be found fully stated *post*, tit. "Land Transfer Acts and Rules."

By sub-sect. 3 of sect. 7 of 44 & 45 Vict. c. 41, it is also provided that where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then within this section, the wife is to be deemed to convey, and to be expressed to convey by direction of her husband as beneficial owner; and in addition to the covenant implied on the part of the wife, there is also to be implied (1) a covenant on the part of the husband as the person directing, and (2) a covenant on his part in the same terms as the covenant implied on the part of the wife.

This sub-section enables covenants on the part of the husband to be incorporated where husband and wife convey. If the husband consents but does not convey, the covenant is only implied on the wife's part. In practice, however, where the estate is not the wife's separate property, the wife conveys and the husband conveys and confirms. In such case both husband and wife should be expressed to convey as beneficial owners, and then the proper covenants on the part of each will be implied.(c)

The character in which the person conveys, as beneficial owner, trustee, mortgagee, personal representative, &c., should be stated, or no covenant under sect. 7 will be implied (sub-sect. 4).

And a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land, is excluded from sect 7 (sub-sect. 5).

The benefit of a covenant implied under sect. 7, is annexed and incident to and runs with the estate of the implied covenantee, and may be

(a) See Dart's V. & P. 618, 6th edit.; 2 David. Conv. 558, pt. 2, 4th edit.; *Harding v. Metropolitan Railway Co.*, 7 Ch. App. 154, 160; 26 L. T. Rep. N. S. 109; 20 W. R. 321.

(b) See forms 1 Prid. Conv. 339, 341, 17th edit.

(c) Wolst. & B. Conv. 39, 7th edit.; Dart's V. & P. 620, 6th edit.

enforced by every person in whom the estate is, either for the whole or any part thereof, from time to time vested (sub-sect. 6). An implied covenant under sect. 7 will, therefore, be more valuable than an express covenant, as it precludes any difficulty as to what covenants do or do not run with the land.(a)

The implied covenant may be varied or extended by deed, and will then, as far as may be, operate as if such variations or extensions were directed in sect. 7 to be implied. As before stated, sect. 7 only applies to conveyances made after the commencement of the Act (sub-sects. 7, 8).

By sect. 58 of the Act it is provided that, after the commencement of the Act, a covenant relating to land of inheritance, or devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his heirs and assigns, and have effect as if heirs and assigns were expressed. And that a covenant relating to land not of inheritance, or not devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his executors, administrators, and assigns, and have effect as if executors, &c., were expressed (sub-sects. 1, 2, 3).

Although this sect., as to covenants in deeds executed after 31st December, 1881, renders it unnecessary to mention the word "assigns" to make the benefit of a covenant run with the land; yet it will not in the absence of the word "assigns" make a covenant run with the land where it would not formerly do so if that word were expressed.(b) We shall, however, again refer to this point, *post*, tit. "Leases."

By sect. 59 a covenant and a contract under seal, and a bond or obligation under seal, made or implied after the Act, will, unless a contrary intention is therein expressed, operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, of the person making the same, though not expressed to bind heirs. This section extends to a covenant implied by virtue of this Act (sub-sects. 1-4).

Under the 11 Geo. 4 & 1 Will. 4, c. 47, s. 6, the heir was liable to be sued on his ancestor's covenants to the extent of the assets devolving upon him. All covenants, &c., will now bind the heir or devisee though not expressly mentioned. It must, however, be borne in mind that by the 32 & 33 Vict. c. 46, specialty debts rank no higher than simple contract debts in the administration of assets.(c)

By sect. 60 of 44 & 45 Vict. c. 41, a covenant and a contract under seal, and a bond or obligation under seal, made with two or more jointly to pay money, make a conveyance, or do any other act, to them or for their benefit, is to be deemed to include and to imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, &c., devolves (sub-sect. 1).

(a) See Wolst. & B. Conv. 41, 7th edit.; *David v. Sabin*, sup., p. 142.

(b) See *Spencer's Case*, 1 Sm. L. C. 66, 9th edit.; Wolst. & B. Conv. 116, 8th edit.; Hood & C. Conv. 139, 140, 5th edit.; Dart's V. & P. 876, 6th edit.

(c) See also *Re Hedgely*, 34 Ch. Div. 379; 38 & 39 Vict. c. 77, s. 10.

This section applies only to covenants, &c., made or implied after the commencement of the Act, and only as far as a contrary intention is not expressed in the covenant, &c.; but it extends to a covenant implied by virtue of the Act (sub-sects. 2, 3, 4).

The effect of sect. 60 will be to reduce the form of a covenant made with several persons to that of a covenant with one person: that is, will make it unnecessary to use the words "survivors or survivor," &c.

By sect. 64 of the Act it is provided that in the construction of a covenant, or proviso, or other provision, implied in a deed by virtue of the Act, words importing the singular or plural number, or the masculine gender, are to be read as also importing the plural or singular number, or as extending to females, as the case may require. See also sect. 7, sub-sect. 1.

Breach of Covenants.—A covenantee in an ordinary indenture who is a party to it may, on breach of the covenant, sue the covenantor who has executed it, though he himself has not executed it, notwithstanding there may be cross covenants on the part of the covenantee which are stated to be the consideration for the covenants on the part of the covenantor.^(a) But in the case of a lease under seal, it has been held that, as the covenants to pay rent, repair, &c., depend on the interest derived under the lease, and are made because the covenantor obtains that interest, and are, therefore, not obligatory if the lessor does not execute, for by not executing, that interest has not been created to which such covenants are annexed, and they do not begin to operate unless the term commences.^(b)

However, since the Judicature Acts, where a tenant has entered into possession under an agreement of which specific performance will be decreed, he holds under the terms of that agreement^(c), as will be fully shown *post*, tit. "Leases."

A general covenant that the vendor is seised in fee, or has good right to convey or assign, is broken immediately after the execution of the deed if the seller has not the estate purported to be granted or assigned, and the purchaser need not wait till he is evicted. But a covenant for quiet enjoyment affords no right of action until disturbance.^(d) A general covenant for quiet enjoyment is not broken by a *wrongful* claim or eviction.^(e) A temporary inconvenience which does not interfere with the estate, title, or possession is not a breach of a covenant for quiet enjoyment.^(f)

Covenants for title are to be construed literally and without the importation of any exception not introduced by express words. Therefore,

(a) *Morgan v. Pike*, 14 C. B. 473; 23 L. J. 64, C. P.; Add. Cont. 294, 9th edit.

(b) *Swatman v. Ambler*, 8 Ex. 72; 22 L. J. 81, Ex.

(c) *Walsh v. Lonsdale*, 21 Ch. Div. 9; 52 L. J. 52, Ch.; *Coatsworth v. Johnson*, 55 L. J. 220, Q. B.; 54 L. T. Rep. N. S. 520.

(d) Sug. V. & P. 610, 14th edit.; Dart's V. & P. 881, 882, 6th edit.

(e) *Dudley v. Folliott*, 3 T. R. 584.

(f) *Manchester, &c., Railway Company v. Anderson* (1898), 2 Ch. 394, 401; 67 L. J. 568, Ch.; 78 L. T. Rep. N. S. 821, C. A.

defects of title to an estate expressed to be conveyed by a purchase deed, if they come within the terms of the covenants for title, are not to be excluded from their operation on the ground that they appear on the face of the conveyance or are otherwise known to the purchaser.^(a)

The covenant for further assurance, to do all "reasonable" acts, &c., has been held not to be broken by a refusal to do an unnecessary act, or by a refusal occasioned by such an illness as incapacitates the party whose further assurance is required.^(b) And it was doubtful if it entitled the covenantee to demand subsequently a covenant for production of deeds.^(c)

But such a covenant will be broken by a refusal to convey any interest acquired in the estate, even by purchase for value ^(d); or to remove a judgment or other incumbrance.^(e)

The five usual covenants which were formerly expressly included in the conveyance were divided into three classes: (1) the covenants that the vendor was seised in fee and that he had good right to convey, which are strictly covenants for title; (2) the covenants for quiet enjoyment and *that* free from incumbrances (not a covenant that the estate is free from incumbrances, but merely that there shall be no disturbance by incumbrancers); and (3) the covenant for further assurance. And the first class may be broken without there being any breach of the second or third, for the purchaser may not acquire a marketable title and yet may be undisturbed in the possession, or may not require any further assurance, or may obtain what he requires.^(f)

The following rules also applied:—(1) Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct. (2) Where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant unless an express intention to do so appears, or the covenants be inconsistent.^(g) Mr. Dart, however, disputes the accuracy of this proposition.^(h) And (3) a preceding general covenant will not enlarge a subsequent limited covenant.⁽ⁱ⁾

As to the covenants for title implied by the Conveyancing Act, 1881, in *David v. Sabin* ^(k), Lindley, L. J. says: "On looking at the covenant in sect. 7, sub-sect. 1 (A), of the Act, it will be seen that the covenants for right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance are not four distinct covenants, but parts of

(a) *Page v. Midland Railway Company* (1894), 1 Ch. 11, 42: 70 L. T. Rep. N. S. 14: 63 L. J. 126, Ch.; 42 W. R. 116, C. A.

(b) See Dart's V. & P. 887, 6th edit.; 5 Byth. & Jar. Conv. 246, 247, 4th edit., and cases cited.

(c) *Fain v. Ayres*, 2 Sim. & S. 533; 4 L. J. 166, Ch.; but see now 44 & 45 Vict. c. 41, s. 9, stated *post*.

(d) Dart's V. & P. 888, 6th edit.

(e) *King v. Jones*, 5 Taunt. 418; cited by North, J. in *Re Jones* (1893), 2 Ch. 461; 62 L. J. 996, Ch.

(f) Dart's V. & P. 889, 6th edit.

(g) See Sug. V. & P. 605, 607, 14th edit.

(h) See Dart's V. & P. 890, 6th edit.

(i) Sug. V. & P. 608, 14th edit.

(k) (1893), 1 Ch., p. 531.

one entire covenant beginning with and controlled throughout by the words 'that notwithstanding anything by the person who so conveys or anyone through whom he derives title, otherwise than by purchase for value.' These words render a vendor's covenant a qualified covenant."

Upon the death of a covenantee where covenants for title have been broken in his lifetime, the executor or administrator cannot sue thereon without showing some special damage to the testator in his lifetime; and except as to such damage, the right to sue descends with the land, if freehold or copyhold, to the heir or devisee (*a*); subject, however, as to a death after 31st December, 1897, to the freeholds devolving in the first instance on the personal representative of the deceased, as already shown. (*b*) In the case of leaseholds the right passes to the executors or administrators, or if specifically bequeathed, to the legatee after the assent of the executor to such bequest. (*c*)

Damages.—If, after completion by payment of the purchase-money and execution of the conveyance, it is discovered that the vendor had no title, and the purchaser is evicted and sues on his covenants for title and quiet enjoyment, the measure of damage will be the amount of the price or consideration paid for the property with interest since the eviction. (*d*)

It seems that the purchaser cannot recover the expenses of improvements made by him on the property (*e*); unless the land be offered for sale as and purchased for building purposes, when it seems the purchaser may, in case of eviction, recover not only the value of the land but also the amount spent in the erection of houses subsequent to his conveyance. (*f*)

Compensation.—The point as to a purchaser claiming compensation after execution of the purchase deed has already been considered. (*g*)

Notice, Fraud, &c.—We have already (*h*) considered this subject, and it may here be added that a transferee or incumbrancer who has in the first instance paid his money and obtained a merely equitable title without notice of any prior interests, may perfect the title even after notice of such interests, by acquiring the legal estate, not held upon existing trusts, and use that legal estate against all such prior claims or interests (*i*); subject, however, as to lands in Yorkshire to the effect of registration giving priority. (*k*)

(*a*) *Kingdon v. Nottle*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; *Jones v. King*, 4 M. & S. 188; Add. Cont. 222, 9th edit.

(*b*) See 60 & 61 Vict. c. 65, ss. 1 to 5, *ante*, p. 29.

(*c*) Dart's V. & P. 891, 6th edit.

(*d*) *King v. Jones*, 5 Taunt. 418; Add. Cont. 487, 9th edit.; Dart, 893; and see *Jenkins v. Jones*, 9 Q. B. Div. 128, where the value of the land was recovered, although only a small price was paid for it. See also *ante*, p. 72.

(*e*) *Lewis v. Campbell*, 8 Taunt. 715; Add., *sup.*; Dart's V. & P. 894, 6th edit.

(*f*) *Bunney v. Hopkinson*, 27 Beav. 565; 29 L. J. 93, Ch.; 1 L. T. Rep. N. S. 53; Add. *sup.*; Dart, *sup.*

(*g*) *Ante*, p. 50.

(*h*) *Ante*, pp. 85 to 89.

(*i*) *Bassett v. Nosworthy*, 2 L. C. Eq. 150, 7th edit.; *Phillips v. Phillips*, 4 De G. F. & J. 208; 5 L. T. Rep. N. S. 655; 31 L. J. 321, Ch.; 10 W. R. 236; *Powell v. London and Provincial Bank* (1893), 1 Ch. 610; 68 L. T. Rep. N. S. 386; (1893), 2 Ch. 555; 69 L. T. Rep. N. S. 421; 62 L. J. 795, Ch.

(*k*) See *ante*, p. 89; *et post*, tit. "Searches."

Purchasers' Covenants.—As a rule a purchase deed of freeholds does not contain any covenants by a purchaser. But where a vendor is personally subject to liabilities, either in respect of the estate, or for the performance of which the estate stands as security, the purchaser of the estate must undertake the liabilities, and must covenant to indemnify the vendor against them.^(a) Thus, in the case of the sale of an equity of redemption, the purchaser, even in the absence of express stipulation, incurs a liability to pay the mortgage debt and future interest.^(b)

Acknowledgment of Right to Production.—We have briefly shown (*ante*, pp. 54, 55) the rights of vendor and purchaser where the former retains possession of the title deeds, and that an acknowledgment and an undertaking are substituted for the covenant for production. We will now give the effect of 44 & 45 Vict. c. 41 hereon more fully.

By sect. 9, when a person retains possession of documents and gives to another a written acknowledgment of his right to production and to delivery of copies thereof, such acknowledgment binds the documents to which it relates in the possession or under the control of the person retaining them, and of every other person having possession or control thereof from time to time; but binds each individual possessor or person as long only as he has possession or control thereof; and every such person must specifically perform the obligations imposed by such acknowledgment, unless prevented from so doing by fire or other inevitable accident; such performance to be at the written request of the person to whom the acknowledgment is given, or of any person, except a lessee at a rent, having or claiming any estate, interest, or right through or under that person, &c. (sub-sects. 1, 2, 3).

The obligations are: (1.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production, or by anyone by him authorised in writing:

(2) An obligation to produce the documents, or any of them, at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, &c.:

(3.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them (sub-sect. 4).

The costs and expenses of, or incidental to, the specific performance of any of the foregoing obligations are to be paid by the person requesting performance (sub-sect. 5).

An acknowledgment does not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising (sub-sect. 6).

A person claiming to be entitled to the benefit of an acknowledgment may apply to the Chancery Division by summons at chambers for an

(a) Dart's V. & P. 628, 6th edit.

(b) *Waring v. Ward*, 7 Ves. 332, 337.

order directing the enforcement of such acknowledgment, which may be ordered accordingly (sub-sect. 7 ; sect. 69, sub-sects. 1, 3).

An acknowledgment is to satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents (sub-sect. 8).

This section removes the difficulty as to covenants for production running with the land (*a*), and it also removes the personal liability of the original covenantor after he has parted with the documents ; transferring that obligation to the subsequent possessor.

Undertaking for Safe Custody of Deeds.—By sub-sect. 9 of sect 9, where a person retains possession of documents and gives to another a written *undertaking* for safe custody thereof, such undertaking imposes on the person giving it, and on every person having possession or control of the documents from time to time, so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

It will be noticed that if an acknowledgment only is given all liability for loss or destruction is expressly excluded by sub-sect. 6.

Any person claiming to be entitled to the benefit of such an undertaking may apply to the Chancery Division by summons at chambers to assess damages for any loss, destruction of, or injury to the documents, or any of them, and the court may, if it thinks fit, direct an inquiry as to the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs, &c. (sub-sect. 10 ; sect. 69, sub-sects. 1, 3).

An undertaking for safe custody of documents satisfies any liability to give a covenant for safe custody of documents (sub-sect. 11 ; see also sub-sect. 12).

The provisions of sect. 9 apply only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking ; and only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of the Act (sub-sects. 13, 14).

An ordinary vendor retaining the title deeds must give both the acknowledgment and undertaking, unless this obligation be negatived by a stipulation to the contrary. But where the vendor is a trustee he should stipulate that he will give an acknowledgment only, and not an undertaking ; for otherwise there is some diversity of opinion as to whether the trustee having possession of the deeds should be called upon to give both the acknowledgment and undertaking. And as these are given by the person who “retains possession” of the documents, a mortgagor should not give the undertaking ; he can, however, procure production of the documents under sect. 16 of the Act, and may safely enter into a covenant to that effect. (*b*)

(*a*) See Byth. & Jar. Conv. 256, 4th edit.

(*b*) See Wolst. & B. Conv. 46, 47, 7th edit. ; Hood & Challis, Conv. 48, 49, 5th edit.

Enactments as to Execution of Deeds.—By 44 & 45 Vict. c. 41, s. 8. on completion of a sale made after the commencement of this Act. the purchaser is not entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but he is entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may be his solicitor.

And by sect. 56 (1), where a solicitor produces a deed, having in the body thereof, or endorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for the consideration, the deed is a sufficient authority to the person liable to pay or give the same for his paying or giving it to the solicitor, without such solicitor producing a separate authority for this purpose from the person who executed or signed the deed or receipt. The foregoing section only applies to cases where the consideration is to be paid or given after the commencement of the Act (sub-sect. 2).

This section meets the case of *Viney v. Chaplin* (a), where it was held that when the purchase-money was to be paid to the vendor's solicitor an express authority to pay him was required from the vendor. See also *ante*, p. 128, as to a receipt in the body of the deed or endorsed thereon being sufficient.

It has been held under sect. 56 (1) that the solicitor must produce the deed containing the receipt, and be acting for the person sought to be charged; having the deed in his office is not equivalent to production of it. (b)

Where the vendors are trustees (*ante*, p. 27) they are by several statutes empowered to give receipts. By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20 (repealing and re-enacting 44 & 45 Vict. c. 41, s. 36), the receipt in writing of any trustee for any money, securities, or other personal property payable, transferable, or deliverable to him under any trust or power is to be a sufficient discharge for the same, and to effectually exonerate the person paying, &c., the same from seeing to the application or being answerable for any loss or misapplication thereof. (c) And by 45 & 46 Vict. c. 38, the receipt in writing of the trustees of a settlement, or of one trustee, if one is empowered to act, for any money or securities paid, &c., effectually discharges the payer, &c., therefrom, and from seeing to the application or being answerable for any loss or misapplication thereof, &c. (sect. 40). And a trustee may now, by 56 & 57 Vict. c. 53, s. 17, appoint a solicitor as his agent to receive and give a discharge for money or valuable consideration receivable by the trustee under the trust, by permitting him to hold and produce the deed containing a receipt for the consideration, as provided by 41 & 42 Vict. c. 41, s. 56, set out *supra*.

Prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59, s. 2), repealed and re-enacted by 56 & 57 Vict. c. 53, s. 17, it had been held that

(a) 2 De G. & J. 468, 482.

(b) *Day v. Woolwich Equitable Building Society*, 40 Ch. Div. 491; 58 L. J. 280, Ch.; 60 L. T. Rep. N. S. 752; 37 W. R. 431.

(c) This section is more full and comprehensive than the power first given by 22 & 23 Vict. c. 35, s. 23, or that of the repealed Act, 23 & 24 Vict. c. 145, s. 29.

trustee vendors could not take advantage of sect. 56 (1) of 44 & 45 Vict. c. 44 (a); which they may now do to the effect stated *supra*. It has also been held that a purchaser from several trustees is not bound to pay one of them on the written authority of all.(b)

Before the statute 23 & 24 Vict. c. 35, s. 23 (see note (c) *supra*, p. 151), a purchaser of real estate from trustees was bound to see to the application of the purchase money; unless it was declared by the trust instrument expressly, or by implication, as by a charge on the realty of debts generally, that the trustees' receipts were to be a good discharge for such money, as shown *ante*, p. 25.

By 44 & 45 Vict. c. 41, s. 46, the donee of a power of attorney may execute or do any instrument or thing, in and with his own name and signature, and his own seal, when sealing is required, by the authority of the donor of the power; and every instrument or thing so executed and done is as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. This section applies to powers of attorney created by instruments executed either before or after the commencement of the Act.(c)

Before this enactment a deed executed under a power of attorney was executed in the name of the donor of the power, adding the words "by A. B. his attorney," and this practice seems to be still advisable.(d) And it may still be necessary that a purchaser taking a conveyance executed under a power of attorney should ascertain that the donor of the power was alive at the time of execution of the conveyance as fully stated *ante*, p. 109, *et seq.*

To briefly recapitulate the clauses rendered unnecessary, and the changes made in the practice of conveyancing, especially as regards purchase deeds by legislation, it may be stated that there need be no general words, no all estate clause, no particular technical operative word to pass the estate, no necessity to use the word "heirs" or "heirs of the body" to create an estate of inheritance, no express covenants for title, and if there be a covenant, no mention of heirs, executors, administrators, or assigns of either covenantor or covenantee, obligor or obligee; no covenant for production of deeds, an acknowledgment and an undertaking being substituted; no multiplication of receipt clauses for the consideration money, a receipt in the body of the deed, or endorsed thereon, being sufficient.

Deeds may now be made supplemental instead of being endorsed, and are to be read as if indorsed on the previous deed.(e)

The 4th schedule to 44 & 45 Vict. c. 41 gives certain forms of deeds, and it is provided that deeds in the forms given in such schedule, or using expressions to the like effect, are as regards form and expression in relation to the provisions of the Act sufficient.(f) By sect. 66 of the Act protection is given

(a) *Re Bellamy v. Metropolitan Board of Works*, 24 Ch. Div. 387; 48 L. T. Rep. N. S. 801; 31 W. R. 900.

(b) *Re Flower and Metropolitan Board of Works*, 27 Ch. Div. 592; 53 L. J. 955, Ch.; see also Lewin on Trusts, 513, 10th edit.

(c) 44 & 45 Vict. c. 41, s. 46.

(d) 1 David. Conv. 101, 5th edit.

(e) 44 & 45 Vict. c. 41, s. 53.

(f) 44 & 45 Vict. c. 41, s. 57.

The following is the form of conveyance on sale given in the 4th schedule to the Act :

In Witness, &c.

Stamps upon Conveyances.—The Stamp Act, 1891 (54 & 55 Vict. c. 39), provides for the stamp duties to be impressed on conveyances on sales. They are the following:

Where the amount or value of the consideration for the sale does not exceed 5 <i>l.</i>	...	...	...	...	...	£	s.	d.
						0	0	6
Exceeds 5 <i>l.</i> , and does not exceed 10 <i>l.</i>	...	...	...	...	...	0	1	0
„ 10 <i>l.</i>	„	15 <i>l.</i>	...	...	...	0	1	6
„ 15 <i>l.</i>	„	20 <i>l.</i>	...	...	...	0	2	0
„ 20 <i>l.</i>	„	25 <i>l.</i>	...	...	...	0	2	6
„ 25 <i>l.</i>	„	50 <i>l.</i>	...	...	...	0	5	0
„ 50 <i>l.</i>	„	75 <i>l.</i>	...	...	...	0	7	6
„ 75 <i>l.</i>	„	100 <i>l.</i>	...	...	...	0	10	0
„ 100 <i>l.</i>	„	125 <i>l.</i>	...	...	...	0	12	6
„ 125 <i>l.</i>	„	150 <i>l.</i>	...	...	...	0	15	0
„ 150 <i>l.</i>	„	175 <i>l.</i>	...	...	...	0	17	6
„ 175 <i>l.</i>	„	200 <i>l.</i>	...	...	...	1	0	0
„ 200 <i>l.</i>	„	225 <i>l.</i>	...	...	...	1	2	6
„ 225 <i>l.</i>	„	250 <i>l.</i>	...	...	...	1	5	0
„ 250 <i>l.</i>	„	275 <i>l.</i>	...	...	...	1	7	6
„ 275 <i>l.</i>	„	300 <i>l.</i>	...	...	...	1	10	0
„ 300 <i>l.</i>								
For every 50 <i>l.</i> , and also for any fractional part of 50 <i>l.</i> , of such amount or value	...	...	...	...	...	0	5	0

“Conveyance on Sale” includes every instrument, decree or order, including a decree or order for foreclosure, of any court or of any commissioners, whereby any property (a) upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction (s. 54, as explained by 61 & 62 Vict. c. 10, s. 6). Section 55 provides for charging the conveyance with *ad valorem* duty where the consideration consist of stock, &c., and sect. 56 where it consists of periodical payments.

By sect. 57, where any property is conveyed to any person in consideration wholly or in part of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance on the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (sect. 57). So that, for example, where the equity of redemption of land is sold subject to the mortgage debt and also for a certain sum, *ad valorem* duty is payable on the combined sums. Sect. 58 provides for charging *ad valorem* duty when the property is sold for one consideration and is conveyed to the purchaser in separate parcels by different instruments.

And by sub-sect. 3 of this section, where there are several instruments of conveyance for completing the purchaser's title, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but so as not to exceed the *ad valorem* duty payable in respect of the principal instrument.

By sub-sect. 4 on a sub-sale before conveyance to the original purchaser, and the property is conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser. See also sub-sects. 5 and 6.

By sect. 61 the principal instrument is to be ascertained thus; (1) where copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument; (2) in other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, is to be deemed the principal instrument; (3) in any other case (with an exception as to Scotland) the parties may determine for themselves which of several instruments is to be deemed the principal one, and pay the *ad valorem* duty thereon.

By sect. 12 the Commissioners of Inland Revenue may be required by any person to express their opinion with reference to any executed instrument, (1) whether it is chargeable with any duty, or (2) with what amount of duty it is chargeable; and if they are of opinion that the instrument is not chargeable with any duty, it may be stamped with a

(a) As to what is property within the section the reader is referred to Alpe on the Law of Stamp Duties, 103, *et seq.*, 5th edit.

denoting stamp; but if they are of opinion that it is chargeable with duty they are to assess the duty, and when the instrument is stamped in accordance with the assessment, it may be stamped with a stamp denoting that it is duly stamped, and in either case the instrument is to be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty. Certain exceptions are provided for in the section. By sect. 13 a right of appeal is given to a person dissatisfied with the assessment within twenty-one days after the assessment to the High Court.

By sect. 15 (save where other provision is made by the Act) any unstamped or insufficiently stamped instrument may be stamped after execution thereof on payment of the unpaid duty and a penalty of 10%, and a further penalty where the unpaid duty exceeds 10%, of interest thereon at the rate of 5% per cent. per ann. from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.(sub-sect. 1).

By sub-sect. 2, in the case of unstamped instruments specified in the Act.(a) and chargeable with *ad valorem* duty, such instrument must be duly stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom, if first executed abroad, unless the opinion of the Commissioners as to the amount of duty with which the instrument is chargeable has before such expiration been required, as before stated, for in that case the instrument must be stamped in accordance with the assessment within fourteen days after notice of the assessment.

If any such instrument executed after 16th May, 1888, is not duly stamped within the times above mentioned the person liable (b) will incur a fine of 10% and in addition to the penalty payable on stamping the instrument a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp be afforded to the satisfaction of the Commissioners, or of the court, judge, &c. But by sub-sect. 3, amended by 58 & 59 Vict. c. 16, s. 15 (save as provided by the Act), any unstamped or insufficiently stamped instrument which has been first executed out of the United Kingdom may be stamped within thirty days after it has been first received in the United Kingdom on payment of the unpaid duty only. And the Commissioners may, if they think fit, at any time mitigate or remit any penalty payable on stamping.

All the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty, are to be fully and truly set forth in the instrument; and every person who, with intent to defraud Her

(a) These instruments are (1) bond, covenant, or instrument of any kind whatsoever; (2) conveyance on sale; (3) lease or tack; (4) mortgage, bond, debenture, covenant and warrant of attorney to confess and enter up to judgment; (5) settlement.

(b) (1) The obligee, covenantee, or other person taking the security; (2) the vendee or transferee; (3) the lessee; (4) the mortgagee or obligee, transferee, assignee or donee, or person redeeming the security; (5) the settlor.

Majesty, executes an instrument in which all the facts and circumstances are not fully and truly set forth, or, being employed in the preparation of the instrument, omits fully and truly to set forth therein all the facts and circumstances, incurs a fine of 10*l.* (sect. 5).

Until the deed or instrument is properly stamped it cannot, except in criminal proceedings, be given in evidence or be available for any purpose whatever (sect. 14, sub-sect. 4). But on payment to the officer of the court, &c., of the amount of unpaid duty, and the penalty and a further sum of 1*l.*, it may be received in evidence, saving all just exceptions on other grounds (sub-sect. 1).

Practice before Completion.—The draft conveyance having been prepared, a fair copy of it is made and forwarded to the solicitor for the vendor for his perusal and approval. If the vendor's solicitor makes any alterations in or additions to the draft, he usually does so in red or blue ink, and at the foot of the conveyance states that he approves of the draft conveyance, subject to such alterations. He then returns the draft to the solicitor for the purchaser, unless there are other solicitors engaged for other parties to the conveyance, in which case he sends it to them for their approval. The draft, however, ultimately being returned to the purchaser's solicitor. On receipt thereof he will carefully look through it to see whether the alterations, if any, are in any way objectionable or prejudicial to the interests of his client. If the purchaser's solicitor disapproves of the alterations or additions, he should return the draft to the vendor's solicitor, setting out his reasons for disapproval; but he should not strike them out, or otherwise alter the draft, as it is irregular to do so after it has been approved of by the vendor's solicitor.(a)

After the draft conveyance has been finally approved of, it must be engrossed by the solicitor for the purchaser; the draft and engrossment being afterwards sent to the solicitor for the vendor for examination. An appointment is then made for completion.

Before completing the purchase, however, the necessary searches for incumbrances must be made against the vendor, although the usual question has been asked in the requisitions, viz., whether there are any incumbrances not disclosed by the abstract of title, and the vendor's solicitor has answered in the negative. These searches should be made as near the completion of the purchase as possible. This subject will, however, be treated of in the next following pages.

Searches for Registered Documents and Incumbrances.

Although, as before stated, the abstract of title should properly specify all the documents and incumbrances affecting the property sold, still, as in many instances the legislature has provided for the enrolment and registration of documents and incumbrances, for the better protection of purchasers and mortgagees, it is usual before completing a purchase or mortgage to make the usual searches against the vendor for such enrolled or registered documents and incumbrances.

(a) *Staines v. Morris*, 1 Ves. & B. 15.

The counties where documents, &c., are registered, are Middlesex, York, and the town and county of Kingston upon Hull, and where the lands purchased or taken in mortgage lie in any of these counties search must be made against the vendor or mortgagor to see what dealings have taken place in regard to such lands.

Middlesex.

By the Middlesex Registry Act, 1708 (7 Anne, c. 20), it is provided that a memorial of all deeds and conveyances, and of all wills whereby any manors, lands, tenements, or hereditaments in Middlesex may be affected in law or equity, may be registered; and that every such deed and conveyance shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for value, unless such memorial thereof be registered before the registration of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee claims; and that every such devise by will shall be adjudged fraudulent against a subsequent purchaser or mortgagee, unless a memorial thereof be duly registered (sect. 1).

By sect. 8 it is provided that all memorials of wills that are registered within six months after the death of the devisors dying in Great Britain, or within three years after the death of devisors dying on the sea or beyond the sea shall be valid against subsequent purchasers as if registered immediately after the death.

By the 37 & 38 Vict. c. 78, s. 8, where a will devising land in Middlesex or Yorkshire has not been registered within the proper time, a conveyance of the land to a purchaser or mortgagee, by the devisee if registered before, will take precedence of a conveyance from the testator's heir-at-law.

The memorial of deeds and conveyances (which may now be on paper) must be under the hand of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, attested by one witness.(a)

The memorial need not be under seal; nor need the signing thereof be verified by oath; but the witness to the memorial is to be a witness, or one of the witnesses, if any, to the original instrument, unless the witness has since died, or gone abroad, &c.(b)

The memorial of a will must be under the hand of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by one witness.(c)

The memorial of any deed, conveyance, or will, must contain the day of the month and the year when such document bears date, and the names and additions of all the parties to the deed or conveyance, and of the devisor or testatrix of the will, and of all the witnesses to the deed, conveyance, or will, and where practicable the places of their abode, and

(a) See 54 & 55 Vict. c. 64, sched. 1, rr. 1, 2.

(b) Land Reg. (Middlesex Deeds) R., 1892, rr. 5, 6.

(c) 54 & 55 Vict. c. 64, sched. 1, rr. 1, 2; Land Reg. (Middlesex Deeds) R., 1892, r. 5, 6.

mention the lands and hereditaments contained in any such document so far as the same appear from the original instrument. And where the original instrument contains a plan, a copy thereof, or of so much as is referred to in the memorial, is to be drawn on the memorial, unless owing to its size this cannot be done, for then a tracing on linen duly authenticated is left with the memorial.(a)

The deed, conveyance, and will or probate, must be produced when registering the memorial; and the deed, &c., is endorsed with a certificate of registry by an officer of the registry, which is evidence thereof.(b)

It is no longer necessary for the validity of any judgment, statute, or recognisance that a memorial thereof be registered under the Act 7 Anne, c. 20.(c)

The Middlesex Registry is now transferred to the land registry established under the Land Transfer Act, 1875, and forms part of that office.(d) And any person deriving title under an instrument (capable of registration under the Middlesex Registry Acts) which confers on him the right to apply for registration with a possessory title of the land comprised in it under the Land Transfer Act, 1875, may at his option either register a memorial of an instrument under the Middlesex Registry Acts, or apply for registration with possessory title under the Land Transfer Act, 1875. Such registration, when completed, bears the same date as the application, and renders unnecessary the registration of the instrument under the Middlesex Registry Acts.(e)

Any person may search any register or index kept under the Act. And the registrar when required is to make searches concerning all memorials in the registry and give certificates concerning the same if required.(f)

The stats. 2 & 3 Anne, c. 4; 6 Anne, c. 35, and 8 Geo. 2, c. 6, contain similar provisions to those contained in the 7 Anne, c. 20, as to the registration of assurances, &c., of lands in Yorkshire. The Acts relating to Yorkshire have, however, been repealed as from 1st January, 1885, save as to rights acquired under assurances made, or under wills of persons dying, before that date.(g)

The statute of Anne does not extend to copyhold estates, leases at rack rent, or leases not exceeding twenty-one years, where the actual possession and occupation go along with the lease; or to lands in the City of London; or to Chambers in Sergeants' Inn, the Inns of Court, or Chancery (h); nor to an equitable mortgage by deposit only.(i) And an order of the court adjudicating a debtor a bankrupt, and directing his estate to be summarily administered under sects. 20 and 121 of the Bankruptcy

(a) 54 & 55 Vict. c. 64, sched. 1, r. 5; Land Reg. (Middlesex Deeds) R., 1892, rr. 3, 4.

(b) 54 & 55 Vict. c. 64, sched. 1, rr. 6, 7. (c) 54 & 55 Vict. c. 64, s. 6.

(d) 54 & 55 Vict. c. 64, s. 1. (e) 54 & 55 Vict. c. 64, sched. 1, r. 14.

(f) 54 & 55 Vict. c. 64, sched., r. 11. (g) 47 & 48 Vict. c. 54, ss. 2, 4, 51.

(h) 7 Anne, c. 20, s. 17; Sug. Conc. V. 581.

(i) *Sumpter v. Cooper*, 2 B. & Ad. 223; and see *Kettlewell v. Watson*, 26 Ch. Div. 501; but as to lands in Yorkshire, see *post*.

Act of 1883 (46 & 47 Vict. c. 52), by which the official receiver becomes the trustee in bankruptcy, is not a "conveyance" within the Middlesex Registry Act, and need not be registered to preserve the priority of the official receiver's title.(a)

But a deed of appointment under a power should be registered.(b)

And a deed of enfranchisement of copyholds in Middlesex must be registered, not being within the exception of copyhold estates in the Act of Anne.(c) It has also been held that a purchaser buying an estate in Middlesex with notice of a prior unregistered incumbrance will be bound thereby; for, having notice, he has got all the statute of Anne intended to supply.(d) But that registration of an equitable mortgage in Middlesex is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage.(e) When a mortgage is paid off a certificate of the instrument of satisfaction may be registered. The signature to the certificate must be verified by the oath of the witnesses thereto.(f)

Yorkshire.

Registration of deeds, wills, &c., of lands in this county is now regulated by 47 & 48 Vict. c. 54 (1884), and 48 & 49 Vict. c. 26 (1885).

The expression "the three ridings" means the north, east, and west ridings; and east riding includes lands within the town and county of Kingston upon Hull.(g)

All assurances made and all wills of any testators dying after the commencement of the Act, by which any lands within any of the three ridings are affected may be registered.(h)

Assurance includes any conveyance, enlargement of term into fee simple, memorandum of charge, deed of consent to the discharge of a trustee, statutory receipt, private Act of Parliament, award or order of the Land Commissioners (now the Board of Agriculture) (i) order of a court, certificate of appointment of a trustee in bankruptcy, or affidavit of vesting under any Act of Parliament.(k) A memorandum of agreement subject to a condition for the sale and purchase of land is not within this section.(l)

In the case of deeds, wills and other assurances (save private Acts of Parliament, memoranda of charge, or affidavits of vesting, &c., for

(a) *Re Calcott and Elvin*, 67 L. J. 553, Ch.; 78 L. T. Rep. N. S. 826; 46 W. R. 673; (1898) 2 Ch. 460, C. A.

(b) *Scrafton v. Quincey*, 2 Ves. sen. 412.

(c) *R. v. Registrar for Middlesex*, 21 Q. B. Div. 555; 57 L. J. 577, Q. B.; 59 L. T. Rep. N. S. 242; 36 W. R. 775.

(d) *Le Neve v. Le Neve*, 1 L. C. Eq. 26, 6th edit.; 2 Id. 175, 7th edit.

(e) *Morecock v. Dickens*, Amb. 678; but see *Credland v. Potter*, 10 Ch. App. 8.

(f) Land Registry (Middlesex Deeds) Rules, 1892, r. 5, form 4.

(g) 47 & 48 Vict. c. 54, s. 3.

(h) 47 & 48 Vict. c. 54, s. 4.

(i) See 52 & 53 Vict. c. 30, ss. 2, 10.

(k) 47 & 48 Vict. c. 54, s. 3.

(l) *Rodger v. Harrison* (1893), 1 Q. B. 161; 62 L. J. 213, Q. B.; 68 L. T. Rep. N. S. 66.

which other provision is made) either a memorial thereof, or the deed, will, or other assurance at full length may be registered.(a) But the original deed, will, or probate, &c., must be produced before it can be registered.(b)

The memorial of a *deed* must be under the hand and seal of some or one of the parties thereto, or some or one of their or his heirs, executors, administrators, guardians or trustees, attested by one or more witnesses, one of whom at least is a witness to the execution of the deed, and must contain (1) the date of the deed; (2) the name, description of residence and occupation of the parties, as set out therein; (3) the like as to the witnesses to the execution of the deed; (4) a description of all the lands affected by the deed within the riding, as expressed in the deed, or to the same effect; (5) the name, description of the residence and occupation of the person on whose behalf the memorial is to be registered.

In the case of a *will* the memorial must be under the hand and seal of one of the trustees or executors of the will, or of some person claiming an interest thereunder in some of the lands affected thereby within the riding, and be attested by one or more witnesses, and contain (1) the date of the will; (2) the date of the death of the testator; and (3) his name, description of residence and occupation, as set out in the will; (4) the like as to the witnesses thereto, as far as appears therein; (5) a description of all the lands affected by the will within the riding, as expressed in the will, or to the same effect; (6) the name and description of residence and occupation of the person on whose behalf the memorial is to be registered.(c)

A caveat may be given respecting any lands by any person claiming any interest therein, and registered, and unless removed or cancelled, remains in force for the time specified therein, and if within the time the caveat remains in force any assurance is executed by the person giving the caveat in favour of the person registering the caveat, and duly registered, such assurance has priority as though registered upon the date on which the caveat was registered, &c.(d)

If a person interested under a will cannot register it within six months after the testator's death, he may, within this period, register a notice of it; and if the will is registered within two years after the testator's death, it has priority as though registered upon the date on which such notice was registered, and such last mentioned date is, for all purposes, to be deemed to be the date of the registration of the will.(e)

An heir who believes his ancestor died intestate may, after the expiration of six months from the death, register an affidavit of intestacy, and then any assurance for value by the heir, duly registered, is to have priority over any will of the supposed intestate registered after the registration of such assurance, &c.(f)

A memorandum of a lien for unpaid purchase money, or charge by

(a) 47 & 48 Vict. c. 54, s. 5.

(b) Id. s. 8.

(c) 47 & 48 Vict. c. 54, s. 6.

(d) 48 & 49 Vict. c. 26, s. 3.

(e) 47 & 48 Vict. c. 54, s. 11.

(f) Id. s. 12.

deposit of title deeds, duly signed, may be registered, and until registered has no effect or priority against a registered assurance for value.(a)

All assurances entitled to be registered are to have priority according to the date of registration and not according to the date or execution of such assurances, and every will entitled to be registered according to the date of the testator's death, if the date of registration be within, &c., six months after the death, or according to the date of registration if that be not within such six months. These priorities are to have full effect in all courts except in case of actual fraud, and no person is to lose any priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud. But this is not to confer upon any person claiming without valuable consideration any further priority or protection than would belong to the person under whom he claims.(b)

A solicitor who is aware that a security in which his client is interested is not perfected by registration, and with such knowledge takes and registers a subsequent mortgage of the same property in his own favour and claims priority for his own mortgage over the security of his client is guilty of "actual fraud" within the meaning of sect. 14.(c)

The Act is not to extend to copyholds, or to any lease not exceeding twenty-one years, or to any assignment thereof, where accompanied by actual possession from the making of such lease or assignment.(d)

And the priority or protection formerly given or allowed to any estate in lands by reason of such estate being tacked to any legal or other estate therein, is in future abolished as to lands within the three ridings, though the party claiming such protection be a purchaser for value without notice.(e)

It has already been stated that by 37 & 38 Vict. c. 78, where a will devising land in Middlesex or Yorkshire has not been registered within due time, an assurance of the land to a purchaser or mortgagee by the devisee, if registered before, takes precedence over any assurance from the testator's heir-at-law (s. 8). As to lands in Yorkshire, however, see also sects. 11, 12, 14, of 47 & 48 Vict. c. 54, set out, *ante*, p. 160, *et supra*.

In a case under one of the old Yorkshire Registry Acts it was held that where a will was not registered within the prescribed time, and the heir conveyed to a mortgagee without notice, and the conveyance was duly registered, and a will was afterwards discovered and registered, the conveyance by the heir prevailed.(f)

(a) 47 & 48 Vict. c. 54, s. 7; *Battison v. Hobson*, (1896) 2 Ch. 403; 65 L. J. 695, Ch.; 74 L. T. Rep. N. S. 689.

(b) 47 & 48 Vict. c. 54, s. 14; 48 & 49 Vict. c. 26, s. 4. Sect. 15 of 47 & 48 Vict. c. 54, made registration actual notice; but this section is repealed by 48 & 49 Vict. c. 26, s. 5. This latter section is, however, in its turn repealed by 61 & 62 Vict. c. 22, to the effect therein specified.

(c) *Battison v. Hobson*, *supra*.

(d) 47 & 48 Vict. c. 54, s. 28.

(e) *Id.* s. 16.

(f) *Chadwick v. Turner*, 1 Ch. App. 310; 35 L. J. 849, Ch.; 14 L. T. Rep. N. S. 86; 14 W. R. 496.

As to lands in Yorkshire, a purchaser from a devisee should now require the will to be registered, and a purchaser from an heir-at-law should require him to register an affidavit of intestacy.

Certificate of Registration.

In the offices of both Yorkshire and Middlesex a certificate of registration is indorsed by the registrar on every deed, will, probate, &c., which certificate is signed by him and in Yorkshire also sealed with the seal of the registry, and is then receivable in evidence.(a)

By the Land Transfer Act, 1875, it is provided that any land situate within the jurisdiction of the local registry of Middlesex or Yorkshire is, if registered under that Act, to be exempt from such jurisdiction (sect. 127). By the Land Transfer Act, 1897, sched. 1, the above section is not to apply to estates and interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land. But by sect. 17 (3), if the land is removed from the register of the Land Transfer Acts it is to be again subject to the local jurisdiction.

The Search.

The search in Middlesex or Yorkshire should extend over the whole period covered by the abstract.(b)

The search in either county may be made by the purchaser's solicitor; or on request by an official of the registry, and a certificate of the result of such official search may be required.(c)

By the Yorkshire Act it is provided that where any solicitor, trustee, executor, agent, or other person in a fiduciary position, either by himself or by a solicitor, obtains a certificate of the result of an official search, or a certified copy of any document enrolled in the register, &c., such solicitor, &c., shall not be answerable for any loss, damage, or injury arising from any error in such certificate or copy.(d)

And by the Land Registry (Middlesex Deeds) Rules, 1892, where a person obtains an official certificate of search he is not to be answerable in respect of any loss arising from error therein. Where the certificate is obtained by a solicitor acting for trustees, executors, or other persons in a fiduciary position, those persons also are not to be answerable.(e)

*Judgments, Crown Debts, Writs of Execution, Lis Pendens, Annuities,
Deeds of Arrangements, and Land Charges.*

Before completing a purchase or mortgage of land, whether situate in a register county or not, it is usual to make searches for the above specified incumbrances. We will take these seriatim.

(a) 47 & 48 Vict. c. 54, s. 9; 54 & 55 Vict. c. 64, sched. 1, r. 7; *et ante*, p. 111.

(b) Dart's V. & P. 567, 6th edit.

(c) 47 & 48 Vict. c. 54, ss. 19, 20; Reg. R. 1885; 54 & 55 Vict. c. 64, sched. 1, rr. 10, 11; Land Registry (Middlesex Deeds) Rules, 1892, rr. 9-14.

(d) 47 & 48 Vict. c. 54, s. 23.

(e) r. 14.

Judgments.—The 13 Ed. 1, c. 18, enabled a judgment creditor to have either a *fi. fa.* against the debtor's goods, or an *elegit* authorising the sheriff to deliver all the chattels of the debtor (saving his oxen and beasts of the plough), and one half of his lands. The term "lands" in the statute included rentcharges and tithes, but it did not include copyhold land. And by the Bankruptcy Act, 1883, s. 146, the debtor's goods can no longer be taken under an *elegit*.

By 1 & 2 Vict. c. 110, the right of a judgment creditor as to his debtor's lands was remodelled; and thereunder he is entitled to have delivered to him under a writ of *elegit* all such lands, rectories, tithes, rents, and hereditaments, including copyholds, as the person against whom execution is issued, or any person in trust for him, shall have been seised or possessed of at the date of the judgment, or at any time afterwards, or over which such person shall have any disposing power which he might without the assent of any other person exercise for his own benefit (sect. 11). And by sect. 13 the judgment was to be binding as against the judgment debtor and all persons claiming under him after such judgment, &c. And the judgment creditor was to be entitled to enforce the charge in equity, but not until after the expiration of one year from the entering up of the judgment. By sect. 18 decrees and orders of a court of equity and all rules of a court of common law, and orders in matters of lunacy, whereby any sum of money, &c., is payable, are to have the effect of judgments.

Several statutes were, however, passed to protect purchasers and mortgagees of the lands from the judgment debtor. By sect. 19 of the above Act a judgment, &c., was not to affect any lands as to purchasers or mortgagees until it was duly registered in the name of the judgment debtor in the office of the then Court of Common Pleas.^(a) And by 2 & 3 Vict. c. 11, s. 4, and 18 & 19 Vict. c. 15, s. 6, this registration was to become void against the lands, &c., as to purchasers or mortgagees unless re-registered within five years before the conveyance, &c., to the purchaser or mortgagee.

Again, by 23 & 24 Vict. c. 38, no judgment, &c., entered up after 23rd July, 1860, was to affect land as to a purchaser for value or a mortgagee, even with notice thereof, unless a writ of execution thereon was registered in the name of the *creditor*, before the conveyance or mortgagee, &c., and put in force within three calendar months from its registration (sects. 1, 2). And by 27 & 28 Vict. c. 112, no judgment, &c., entered up after 29th July, 1864, was to effect any land until such land was actually delivered in execution under such judgment, and the writ of execution duly registered in the name of the judgment *debtor*; and no prior registration of the judgment, &c., was to be necessary (sects. 1, 3).

(a) Now merged in the Queen's Bench Division of the High Court; and the registration of any writ of execution, &c., was to be made in the central office of the Supreme Court (42 & 43 Vict. c. 78; R.S.C. 1883, Order LXI.). And by 51 & 52 Vict. c. 51 and 63 & 64 Vict. c. 26, s. 1, this is to be made in the office of the Land Registry, as shown *post*.

Now, however, by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 5 and sch.; sect. 19 of 1 & 2 Vict. c. 110; sect. 4 of 2 & 3 Vict. c. 11, except so far as it applies to *lis pendens*, and sect. 8; also sect. 6 of 18 & 19 Vict. c. 15; sects. 1 and 2 of 23 & 24 Vict. c. 38; and sects. 1 and 3 of 27 & 28 Vict. c. 112, are after 30th June, 1901, repealed.

And by sect. 1 the business of the registrar of judgments hitherto conducted in the central office of the Supreme Court is to be conducted in the office of Land Registry from 1st September, 1900 (sub-ss. 1, 3; Ord. 3rd August, 1900). And by sect. 2 (3) except under an order of the court, no entry is to be made in any register kept under the sections and statutes repealed. And by sect. 4, after the passing of this Act, the Middlesex Registry Act, 1708 (*ante*, p. 157), is not to apply to any instrument made after the *passing* of this Act and capable of registration thereunder or under the Land Charges Act, 1888.

By sect. 2 (1) a judgment or recognisance whether obtained or entered into on behalf of the Crown *or otherwise*, and whether *before or after* the commencement of this Act (1st July, 1901), is not to operate as a charge on land, or any interest therein, or on the unpaid purchase money, unless a writ or order for enforcing it is registered under sect. 5 (*infra*) of the Land Charges Act, 1888.

By 27 & 28 Vict. c. 112, s. 4, as amended by the Land Charges Act, 1900, sch., the creditor to whom any land of his debtor has been delivered in execution may obtain from the Chancery Division in a summary way an order for the sale of the debtor's land (sect. 4). Only lands which the debtor himself could have sold come within this section. Therefore a railway will not be ordered to be sold.^(a) So where a receiver is appointed at the instance of a judgment creditor of the rents and profits receivable in respect of a legal remainder in realty, it is not such a delivery in execution of the remainder as will enable the Court to order a sale under the above Act.^(b)

By 51 & 52 Vict. c. 51 (Land Charges Act, 1888, commencing on 1st January, 1889), s. 5, there is to be kept at the office of the Land Registry a register of writs and orders affecting land, and there may be registered therein any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, &c., and any order appointing a receiver or sequestrator of land (sub-sect. 1). The entry is to be made in the name of the person whose land is affected by the writ or order registered (sub-sect. 2). The registration is to cease to have effect at the expiration of five years from its date, but may be renewed from time to time, and if renewed has effect for five years from the date of renewal (sub-sect. 3). This registration has the same effect as, and makes unnecessary, registration in the central office of the Supreme Court, in pursuance of any other Act (sub-sect. 4).

(a) *Re Bishops Waltham Railway Co.*, 2 Ch. App. 382.

(b) *Re Harrison and Bottomley*, 68 L. J. 208, Ch.; 80 L. T. Rep. N. S. 29; (1899) 1 Ch. 465.

By sect. 6, the writ or order and delivery in execution, or other proceeding, taken in pursuance thereof, is to be void as against a purchaser for value of the land, unless the writ or order is for the time being registered under the Act. But where the proceeding in which the writ or order was issued or made is, for the time being, registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section is to affect the operation of such registration.

And by sect. 3 of the Land Charges Act, 1900, the above section is to apply to every writ and order affecting land issued or made for enforcing a judgment whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this Act, and to every delivery in execution, &c., thereunder.

By sect. 4 of the Land Charges Act, 1888, "land" includes tenements and hereditaments, corporeal and incorporeal, of any tenure.

"Purchaser for value" includes a mortgagee or lessee, &c. "Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but save as aforesaid includes any order or decree having the effect of a judgment.

The 37 & 38 Vict. c. 57, s. 8, provides that no action is to be brought to recover any sum of money secured by a judgment(a), or charged upon or payable out of any land or rent, but within twelve years after a present right to receive the same accrued to some person capable of giving a discharge for the same, unless in the meantime some part of the principal, or some interest thereon, has been paid, or a written acknowledgment of the right thereto has been given signed by the person by whom the same is payable or his agent.

A writ of *elegit* issues from the central office and is directed to the sheriff of the county, who summons a jury to inquire as to the lands, and then he delivers them to the judgment creditor, and afterwards makes a return to the writ. The creditor holds the lands until his debt is satisfied.(b)

By 23 & 24 Vict. c. 115, s. 2, the proper officer(c) is empowered on filing with him an acknowledgment, in due form, to enter satisfaction of a registered judgment, *lis pendens*, decree, order, annuity, or writ of execution, and may issue a certificate of the entry of such satisfaction.

It has already (*ante*, p. 163) been stated what interests may be extended under an *elegit*. But although the 1 & 2 Vict. c. 110, s. 11, includes "rectories and tithes," a rectory constituting an ecclesiastical benefice cannot be taken (d); nor can a remainder be taken, for a person cannot be

(a) It seems the expression "judgment" in the above section refers to judgments generally, and is not confined to judgments which operate as charges upon land: (see *Hebblethwaite v. Peever*, (1892) 1 Q. B. 124; 40 W. R. 318; *Jay v. Johnstone*, (1893) 1 Q. B. 139; 62 L. J. 128, Q. B.; 41 W. R. 161.

(b) 1 Prid. Conv. 144, 16th edit.; Chit. Arch. Pr. 873, *et seq.*, 14th edit.

(c) See *ante*, p. 164.

(d) *Hawkins v. Gathercole*, 6 De G. M. & G. 1; 24 L. J. 332, Ch.; 3 W. R. 194.

“seised or possessed” of a remainder.(a) And it has been held that where the debtor holds the lands subject to any previous incumbrance, whether legal or equitable, the judgment creditor is postponed to the prior incumbrancer.(b)

Where the debtor's interest consists of an equity of redemption or any other equitable interest which cannot be taken under an elegit, then as there is a hindrance in the way of execution at law the creditor may apply to the court for equitable relief, commonly called equitable execution, and the court may appoint a receiver of the rents, &c., of the property.(c) The receiver may be appointed in the original action, and it is not necessary to commence a fresh action for this purpose.(d) Nor is it necessary since the Judicature Act, 1873, to sue out a writ of elegit before applying for a receiver.(e)

By 22 & 23 Vict. c. 35, s. 11, it is enacted that the release from a judgment of part of any hereditaments charged therewith, is not to affect the validity of the judgment as to the hereditaments remaining unreleased. This is not to prejudice the rights of persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release.

Crown Debts.—All freehold lands of a debtor or accountant to the Crown may be taken in execution by the Crown, including equitable estates and equities of redemption; nor can the rights of the Crown be defeated by the execution of a power of appointment. But copyholds are not extendable by Crown process; and chattels real are only bound from the test of the extent.(f)

However, to protect purchasers and mortgagees, the 2 & 3 Vict. c. 11, provided that no judgment, &c., obtained on account of the Crown, or Crown debt by specialty, or any acceptance of office under the Crown should affect any lands thereby made liable, as to purchasers or mortgagees until such judgment, &c., was duly registered (sect. 8). And by 22 & 23 Vict. c. 35, s. 22, this registration was to be renewed within five years before the date of the conveyance, &c. And by 28 & 29 Vict. c. 104, any judgment, &c., obtained on behalf of, or recognizance entered into on account of, or obligation made to, the Crown, after 1st November, 1865, was not to affect land as to a purchaser for value or a mortgagee, even

(a) *Re South*, 9 Ch. App. 369; 43 L. J. 441, Ch.; 30 L. T. Rep. N. S. 347; 22 W. R. 460.

(b) *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507; 25 L. J. 299, Ch.; 4 W. R. 275; 1 Prid. Conv. 144, 16th edit.; Dart's V. & P. 548, 6th edit.

(c) *Hatton v. Haywood*, 9 Ch. App. 229; 43 L. J. 372, Ch.; 30 L. T. Rep. N. S. 279; 22 W. R. 356; *Re Shepherd*; *Atkins v. Shephard*, 43 Ch. Div. 131. But see *Guest v. Cowbridge Railway*, L. R. 6 Eq. 619; Dart's V. & P. *sup.*

(d) *Smith v. Cowell*, 6 Q. B. Div. 75; 50 L. J. 38, Q. B.; 43 L. T. Rep. N. S. 328; 29 W. R. 227.

(e) *Ex parte Evans*, 13 Ch. Div. 252; 41 L. T. Rep. N. S. 565; 28 W. R. 127.

(f) Dart's V. & P. 562, 6th edit.; 1 Prid. Conv. 164, 14th edit.; 148, 16th edit.

with notice, until a writ of execution thereon was registered, before the execution of the conveyance, &c. (sect. 48). Sect. 49 pointed out the mode of registration, and enacted that no other registration of the judgment, &c., was to be necessary.

The registration was formerly made in the Court of Common Pleas; subsequently in the central office of the High Court. But see now *ante*, p. 164.

However, by the Land Charges Act, 1900, sect. 5 and sch., sect. 8 of 2 & 3 Vict. c. 11, and sects. 48 and 49 of 28 & 29 Vict. c. 104, are after 30th June, 1901, repealed. And by sect. 2 (1) of the Land Charges Act, 1900 (as already shown), a judgment or recognizance obtained or entered into on behalf of the Crown, and whether before or after the commencement of this Act, is not to operate as a charge on land, &c., until a writ or order for enforcing it is registered under sect. 5 of the Land Charges Act, 1888.

This section is to apply to any inquisition finding a debt due to the Crown, and any obligation made to the Crown, and any acceptance of office under the Crown, whatever its date, in like manner as it applies to a judgment (sub-sect. 2).

And as already (*ante*, p. 165) shown, by sect. 3 of the Land Charges Act, 1900, sect. 6 of the Land Charges Act, 1888, is to apply to every writ or order affecting land issued to enforce a judgment obtained on behalf of the Crown, and whether obtained before or after the commencement of this Act, &c.

The 2 & 3 Vict. c. 11, s. 9, provided for the discharge of a Crown debt by the registration of a *quietus*. This section is, however, by the Land Charges Act, 1900, sect. 5 and sch., repealed after 30th June, 1901. But by 23 & 24 Vict. c. 115, ss. 1, 2, provision is made for simplifying the practice as to the entry of satisfaction of Crown debts and judgments.(a)

Lis Pendens.—When a *suit is pending* concerning land neither party to the litigation can alienate the property in dispute so as to affect his opponent; for if alienation *pendente lite* were permitted no suit could be brought to a successful termination.(b)

The 2 & 3 Vict. c. 11, s. 7, however, provides that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until it is duly registered as therein provided, and also re-registered as provided by that section, and sect. 4 of the same Act. Formerly the registration was in the office of the Court of Common Pleas, and subsequently in the central office.(c) And it has already (*ante*, p. 164) been stated that under the Land Charges, &c., Act, 1888 (51 & 52 Vict. c. 51), a writ or order affecting land may be registered thereunder, which renders unnecessary registration in the central office (sect. 5); but

(a) See Dart's V. & P. 564, 6th edit.

(b) *Bull v. Hutchens*, 32 Beav. 615; 8 L. T. Rep. N. S. 716; 11 W. R. 866; *Price v. Price*, 35 Ch. Div. 297; 56 L. J. 530, Ch.; 56 L. T. Rep. N. S. 843; 35 W. R. 386.

(c) See *ante*, p. 164; *et post*, pp. 171, 172.

where the proceedings in which the writ or order was issued or made is duly registered as a *lis pendens*, the Act is not to affect the operation of such registration (sect. 6 ; *et ante*, p. 165).

The doctrine of *lis pendens* has no application to personal property, other than chattel interests in land.(a)

Where debts are charged upon a testator's real estate by his will, a creditor's action for the administration of the real and personal estate is a *lis pendens*, which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts.(b)

Annuities.—By 18 and 19 Vict. c. 15, it is provided that any annuity or rentcharge thereafter granted otherwise than by marriage settlement for life or lives, or for years or greater estate, determinable on a life or lives, or not being an annuity or rentcharge given by will, shall not affect any lands, &c., as to purchasers, mortgagees or creditors, unless and until registered as therein provided (sects. 12, 14).

It was held on the construction of s. 12 of 18 & 19 Vict. c. 15, that an unregistered annuity was valid against a subsequent incumbrancer with notice, and against the trustee in bankruptcy of the grantor.(c)

Deeds of Arrangement.—By the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), operating from 1st January, 1888, a deed of arrangement is to be void unless registered within seven clear days after the first execution thereof, or, if executed abroad, within seven clear days after the time at which it would in the ordinary course of post arrive in England, &c. (sects. 1, 3, 5). The registry is to be in the bills of sale department of the central office of the Supreme Court (sect. 8); and the registration is effected in a similar manner to that of the registration of a bill of sale(d) (sect. 6).

“Deed of Arrangement” includes the following, whether under seal or not, made in respect of the affairs of a debtor for the benefit of his creditors generally, otherwise than in pursuance of the bankruptcy laws: (1) an assignment of property; (2) a deed of or agreement for a composition; and where the creditors obtain control over the debtor's property or business; (3) a deed of inspectorship for carrying on or winding-up a business; (4) a letter of licence, &c., authorising the debtor or any other person to manage, &c., the business with a view to the payment of debts (sect. 4). Sect. 12 makes provision for searching the register.

Further, by the Land Charges Registration Act, 1888 (51 & 52 Vict.

(a) *Wigram v. Buckley*, (1894) 3 Ch. 483 ; 63 L. J. 689, Ch. ; 71 L. T. Rep. N. S. 287 ; 43 W. R. 147, C. A.

(b) *Price v. Price*, sup. p. 167, *et ante*, pp. 25, 26.

(c) *Greaves v. Tofield*, 14 Ch. Div. 563 ; 50 L. J. 115, Ch. ; 43 L. T. Rep. N. S. 100 ; 28 W. R. 840.

(d) See *post*, tit. “Bills of Sale.”

c. 51, operating from 1st January, 1889), a register of deeds of arrangement affecting *land* is to be kept at the office of the land registry, where any such deed may be registered in the name of the debtor on the application of a trustee thereof, or of a creditor thereunder. And every such deed, whether made before or after the commencement of the Act, is to be void against anyone who, after the commencement of the Act, becomes a purchaser for value (a) of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land. But this is not to affect any such deed made before the commencement of the Act, until the expiration of one year after its commencement, if registered within that year (sects. 2, 7-9).

The effect of the two above enactments is that a deed of arrangement is (1) void unless registered in the Bills of Sale Department in the Central Office, and (2) is void against a purchaser for value of the land comprised in it, unless such deed is also registered in the register of deeds of arrangement affecting land. "Deed of Arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887 (sect. 4), set out *ante*, p. 168.

Land Charges.—The Land Charges, &c., Act, 1888 (51 & 52 Vict. c. 51), also directs that a register of land charges is to be kept at the office of the Land Registry, where land charges may be registered in the manner prescribed by the Act (sect. 10), and the rules made thereunder.

By sect. 4, "Land Charge" means a rent or annuity, or principal moneys payable by instalments or otherwise, with or without interest charged, otherwise than by deed, upon land under the provisions of any statute, for securing to any person either the moneys spent by him or the costs and expenses incurred by him under such statute, or the moneys advanced by him for repaying the moneys spent, or the costs and expenses incurred by another person under a statute; and a charge under sect. 35 of the Land Drainage Act, 1861, or under sect. 29 of the Agricultural Holdings Act, 1883, but does not include a rate or scot.

A land charge, in the case of freehold land, may be registered in the name of the person beneficially entitled to the first estate of freehold, and in the case of copyhold in the name of the tenant on the Court Rolls, at the time (in each case) of the creation of the land charge. And where the person by whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or life at a rent or to a term of years, the land charge is to be registered also in the name of that person (sect. 10).

Upon the construction of sects. 4 and 10 of the Act it has been held that expenses incurred by a local authority under sect. 257 of the Public Health Act, 1875, for which the owner of the premises for which they are incurred is liable, are not land charges so as to require registration. It seems no land charges are within sect. 10 except such as are created in consequence of an application and at the wish of the owners.(b)

(a) "Purchaser for value" includes a mortgagee or lessee, &c. (sect. 4).

(b) *R. v. Office of Land Registry*, 24 Q. B. Div. 178; 59 L. J. 113, Q. B.

A land charge created after the commencement of the Act is to be void against a purchaser for value of the land charged therewith unless and until registered (sect. 12). And after one year from the first assignment *inter vivos* occurring after the commencement of the Act of a land charge created before its commencement, the person entitled thereto cannot recover it as against a purchaser for value of the land charged, unless it is registered prior to the completion of the purchase (sect. 13).

The registration of a land charge may be vacated by order of the court or a judge (sect. 14).

The Search.

It has already (*ante* p. 162) been stated how a search may be made in the registers or indexes of the counties of Middlesex and York for documents, &c., therein registered. It remains to be shown how searches may be made for judgments, &c.

The entry and register of judgments, Crown debts, writs of execution, extents *lis pendens* and annuities which were formerly made and kept in the office of the Court of the Common Pleas were after 1879 made and kept in the central office of the Supreme Court.(a)

Provision is now made for searches to be made by the proper official of the central office of the Supreme Court.

By the 45 & 46 Vict. c. 39, s. 2, and Rules of December, 1882, made thereon, where any person requires an official search to be made in the central office for entries of judgments, deeds (except as stated *post*), or other matters whereof entries are required or allowed to be made in that office under any statute, he may deliver in the office a written requisition,(b) signed by him, referring to this section, and specifying his name and address and the name against which he desires search to be made, or in relation to which he desires an office copy certificate of the result of search, and other sufficient particulars (sub-sects. 1, 4; rule 1). And he must deliver to the officer a declaration, in the form given by the rules, stating for what purpose the search is required,(c) and purporting to be signed by the person requiring such search, or by a solicitor (rule 2).

The proper officer is then to make the search required, and to make and file in the office a certificate of the result thereof; and office copies of the certificate may be obtained, and are evidence of the certificate.(d)

This certificate, whether in the affirmative or negative, is conclusive in favour of a purchaser, mortgagee, or lessee for value, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid.(e)

Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name to a date not more than one calendar month subsequent to the date of the certificate, a written requisition may be left with the proper officer, who is

(a) 42 & 43 Vict. c. 78 (1879); R.S.C., 1883, Ord. LXI.

(b) See App. to Rules, Form VI.

(c) Id. Forms, I., II.

(d) 45 & 46 Vict. c. 39, s. 2 (2).

(e) 45 & 46 Vict. c. 39, s. 2, sub-s. 3, and s. 1, sub-s. 4 (ii.).

to cause the search to be continued, and the result thereof is to be indorsed on the original certificate, and upon any office copy thereof which has been issued, if produced to the officer for that purpose.(a)

Copies of deeds and documents enrolled may be taken on payment of the prescribed fee(b).

Sect. 2 of 45 & 46 Vict. c. 39, or any rule made thereunder, is not to take away, abridge, or prejudicially affect any right which any person may have independently of the section to make any search in the office, which may still be made as heretofore (sub-sect. 7).

No doubt, however, this section will be taken advantage of by solicitors, as sub-sect. 8 provides that where a solicitor obtains an office copy certificate of result of search under the section, he is not to be answerable in respect of any loss that may arise from error in the certificate. And by sub-sect. 9, where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, they also are not to be so answerable.

And where such persons obtain such an office copy without a solicitor, they are also to be protected in like manner (sub-sect. 10).

Nothing in the section applies to deeds enrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory rule (sub-sect. 11).

It will be remembered that a disentailing assurance, and the deed by which a protector consents thereto, if distinct from the disentailing assurance, must be enrolled (3 & 4 Will. 4, c. 74, ss. 41, 46); also a bargain and sale of freeholds (27 Hen. 8, c. 16); and conveyances under the Statutes of Mortmain (51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73; superseding 9 Geo. 2, c. 36, and other statutes).

By the Land Charges, &c., Act, 1888, s. 17, the provisions as to searches, &c., in the central office contained in sect. 2 of the Conveyancing Act, 1882, are to apply to searches in any register or index kept in pursuance of the Land Charges, &c., Act, and rules have been made and forms provided under it for this purpose, which bear date 1st January, 1889. By sect. 16, however, any person may search the register or index.

If any official search is required the proper form must be filled up as directed by the Acts and rules.

The search which has hitherto been made against a vendor for judgments, revivals, decrees, orders, and rules, and for judgments at the suit of the Crown, statutes, recognisances, Crown bonds, inquisitions, and acceptances of office, for a period extending back for five years; and for executions registered under 27 & 28 Vict. c. 112, and for executions on Crown debts registered under 28 & 29 Vict. c. 104, ss. 48, 49, will still be necessary up to 1st July, 1901 (*ante*, p. 164). The registers, formerly kept in the central office, have been by order, dated 3rd August, 1900, transferred to the office of Land Registry.

(a) Rule 4 of Rules made on sect. 2, 45 & 46 Vict. c. 39.

(b) Rule 5.

After the 30th June, 1901, the search will be greatly simplified in consequence of the provisions of the Land Charges Acts, already detailed.

The search in the office of the Land Registry will be against the vendor (1) in the register of writs and orders for a period of five years back; and (2) in the register of deeds of arrangement and the register of land charges back to the commencement of the Land Charges, &c., Act, 1888 (1st January 1889)(a); unless the vendor's title accrued since this period, in which case the search against him will go back to the time when his title began.(b)

Search should also be made for annuities for a period extending back to 26th April, 1855, or to the time when the vendor's title first accrued, if later than that day (*ante*, p. 168); and for *lis pendens* for five years back (*ante*, p. 167).

If the search in the office of the Land Registry discloses a writ or order affecting the land, or any deed of arrangement, or land charge, &c., the incumbrance must be got rid of. A registered land charge may be vacated by a judge's order, as already stated. So under the Settled Land Act, 1890 (53 & 54 Vict. c. 69), the registration of a writ or order affecting land(c) may be vacated by order of the High Court or a judge (sect. 19).

It has already (*ante*, p. 165) been shown when a judgment debt is barred by the Statute of Limitations.

It is not usual in the absence of special grounds for suspicion to go back further than the last purchaser or mortgagee for value, it being assumed that proper searches were made on behalf of such purchaser or mortgagee (now vendor)(d). If, however, the vendor has acquired the property recently by descent or devise, it will be desirable to extend the search to his ancestor or devisor.(e)

If the vendor has acquired the property by a recent purchase or mortgage, the certificate of search made on his purchase or mortgage should be called for.

As it seems that no land charges are within sect. 10 of the Land Charges, &c., Act, 1888, except such as are created in consequence of an application, and do not include expenses incurred by a local authority and thrown upon the owner of the property, inquiry as to the existence of any such charges should be made of the vestry or local authority.(f)

However, a charge of this nature, if perfect at the time of the

(a) See Form V. in App. to Rules under Land Charges, &c., Act, 1888, *et ante*, pp. 164, 168, 169.

(b) See 1 Prid. 168, 17th edit.; Wolst. & B. Conv. 188, 196, 8th edit.

(c) For a definition of settled land within the Act, see 45 & 46 Vict. c. 38. s. 2, sub-s. 3.

(d) Dart's V. & P. 560, 6th edit.; Wolst. & B. Conv. 196, 8th edit.

(e) 1 Prid. Conv. 158, 16th edit.

(f) See *ante*, pp. 89, 90, 169; but as to registered land, see *post*.

completion of the sale, is, in the absence of stipulation, payable by the vendor. (a)

On purchasing mortgaged property the usual searches should be made against the mortgagor. (b) But as to the mortgagee, if he has been paid off prior to or at the time of the execution of the conveyance to the purchaser, search need only be made against him for *lis pendens*. (c)

If the vendor is a trustee, a search made against him for *lis pendens* for five years back is all that is considered necessary. (d) Thus, when vendors are trustees for sale, and there is a person entitled with a power of sale under sect. 63 of the Settled Land Act, 1882, who does not concur in the sale, a search should be made against the trustees for any order made under sect. 7 of the Settled Land Act, 1884, giving leave to such person to exercise the statutory powers, which may be registered as a *lis pendens*. (e)

If there is reason to suppose that a vendor has been bankrupt, as if a deed of arrangement is discovered, a further search should be made in the records of the Bankruptcy Court to ascertain this. A bankrupt's powers over his property have already been (f) considered.

An official search may also be made for certificates of acknowledgments of deeds by married women, which were required to be filed prior to the Conveyancing Act, 1882 (g); as will be more fully stated in subsequent pages.

If the property purchased be of copyhold tenure the Court Rolls of the manor in which the property is situate must be searched. (h)

It is a common practice to ask the vendor's solicitor whether there are any incumbrances affecting the property not appearing on the abstract, and if he replies in the negative, search may be delayed until immediately before the execution of the purchase deed. However, a vendor cannot be compelled to answer this requisition. (i)

If in making the various searches already detailed, an incumbrance of any kind is discovered, the purchaser's solicitor should at once inform the vendor's solicitor of the fact, and if removable, request its discharge. For a vendor is, in the absence of stipulation, bound to discharge incumbrances which are removable before he can call upon the purchaser to accept a conveyance and pay the purchase money. (k)

(a) *Re Bettsworth and Richer*, 37 Ch. Div. 535; 57 L. J. 749, Ch.; 58 L. T. Rep. 796; 36 W. R. 544; *et ante*, pp. 46, 89.

(b) See Pask, Judg. 143, 144, 3rd edit.

(c) See 18 & 19 Vict. c. 15, s. 11; Dart's V. & P. 538, 6th edit.; *Greaves v. Wilson*, 25 Beav. 434; 28 L. J. 103, Ch.

(d) 1 Prid. Conv. 157, 16th edit.; Wolst. and B. Conv. 185, 7th edit.

(e) 1 Prid. Conv. 173, 14th edit.

(f) See *ante*, pp. 34 to 36, 67.

(g) See Form V. in App. to Rules to Conv. Act, 1882.

(h) Sug. Conc. V. 377, &c.

(i) *Re Ford and Hill*, 10 Ch. Div. 365; 48 L. J. 327, Ch.

(k) *Re Jackson and Oakshot*, 14 Ch. Div. 851; 49 L. J. 523, Ch.; 28 W. R. 794; Dart's V. & P. 666, 6th edit.

By 44 & 45 Vict. c. 41, s. 5, provision is made for the discharge of incumbrances on a sale by the direction of the Chancery Division of the High Court. It provides that where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, on the application of any party to the sale, direct or allow payment into court of such an amount as when invested in Government securities will be sufficient to meet the incumbrance and any interest due thereon; with such additional amount as will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency (except depreciation of investments) not exceeding one tenth part of the original amount paid in, &c. The court may then declare the land to be freed from the incumbrance, and make any necessary order for conveyance, or any vesting order.(a)

Registered Land.

As to the searches that should be made in regard to land registered under the Land Transfer Acts, see *post*, tit. "Land Transfer Acts and Rules."

Inquiry of Trustees, &c.

Where the subject of the sale or mortgage is a chose in action merely, as stock or shares in a public company vested in trustees, or is a debt owing, or a sum due under a policy of life assurance, &c., the proposed purchaser or mortgagee should inquire of the trustees, or the debtor, or insurance office, whether there has been any previous assignment or charge on the fund, or debt within their knowledge. However, it has been decided that a trustee is not bound to answer such an inquiry. He can refer the querist to the *cestui que trust*.(b) On completion of the purchase or mortgage, written notice thereof should immediately be given to the trustees, debtor, or insurance office of the fact. For the rule is that the assignee or incumbrancer, who, having no notice, first gives notice to the trustees, &c., obtains priority over any prior assignee or incumbrancer who has not given notice.(c) And until written notice be given to the debtor, &c., the assignee cannot sue for the debt in his own name.(d) We shall, however, again refer to this subject more fully under the tit. "Mortgages."

(a) 44 & 45 Vict. c. 41, s. 5, sub-s. 1, 2, 3; and as to the construction of this section see *Re Great Northern Railway Company and Sanderson*, 25 Ch. Div. 788; 50 L. T. Rep. N. S. 87; 32 W. R. 519; 53 L. J. 445, Ch.; *Re Freme*, (1895) 2 Ch. 778.

(b) *Low v. Bouverie*, (1891) 3 Ch. 82; 60 L. J. 594, Ch.; 65 L. T. Rep. N. S. 533; 40 W. R. 50, C. A.

(c) *Dearle v. Hall*, 3 Rus. 1; *Consolidated Insurance Company v. Riley*, 1 L. T. Rep. N. S. 209; 1 Gif. 371; *Newman v. Newman*, 28 Ch. Div. 674; 54 L. J. 598, Ch.; 33 W. R. 505; *Low v. Bouverie*, *sup.*; *Ward v. Duncomb*, (1893) A. C. 369; 62 L. J. 881 Ch.; 69 L. T. Rep. N. S. 121; 42 W. R. 69.

(d) 30 & 31 Vict. c. 144; 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

Execution of Purchase Deed and Completion of Purchase.

We have already (*ante*, p. 108) fully stated the provisions of the several statutes relating to the execution of deeds. All deeds must be sealed and delivered; the act of sealing must precede that of delivery. Signing is not required at common law to the due execution of a deed, but it would seem to be necessary under the Statute of Frauds (*a*), and it is the usual practice. Reading over the deed is not essential to its due execution, unless this be required by any party thereto, and then if the deed be not read it is void as to him. (*b*)

It is usual to have the deed executed in the presence of at least one witness, who signs his name as attesting witness. The object of having a witness is, however, rather for the purpose of preserving the evidence than for constituting the essence of the deed itself. (*c*) If a deed is executed under a power, then two witnesses are sufficient, even though the deed creating the power requires more than two witnesses (*d*), as fully stated *ante*, p. 99.

Where a married woman joins her husband as a conveying party, not in respect of property she can transfer as if she were unmarried, which is detailed *ante*, pp. 15 to 21, not only must the deed be executed by her, but she must, as already stated, acknowledge the same before a commissioner duly appointed to take the acknowledgments of married women, or before a judge of the High Court or of a County Court. Before the judge or commissioner receives an acknowledgment he must inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her, and if she answers in the affirmative he is, if he does not doubt the truth of her answer, to receive the acknowledgment; but if it appears to him that it is intended that provision is to be made for her, the commissioner is not to take her acknowledgment until the instrument making such provision is produced to him; or if the provision has not been made, the commissioner must require the terms of the intended provision to be shortly reduced into writing, and verify it by his signature in the margin, or at the foot or back thereof. A memorandum of the acknowledgment must be indorsed on the deed or be written at the foot or margin thereof, and be signed by the person taking the acknowledgment. (*e*)

No person authorised to take acknowledgments of deeds by married women who is interested or concerned either as a party, solicitor, or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment can take the acknowledgment;

(*a*) See *ante*, p. 108.

(*b*) See 1 Steph. Com. ch. 16.

(*c*) See Bl. Com. vol. 2, ch. 17; *et ante*, p. 108.

(*d*) 22 & 23 Vict. c. 85, s. 12; *et ante*, p. 99.

(*e*) See 3 & 4 Will. 4, c. 74, ss. 79-84; 45 & 46 Vict. c. 39, s. 7; Conv. Rules, December, 1882, rr. 2, 3, 5; 51 & 52 Vict. c. 43, s. 184.

and if taken by a person other than a judge, a declaration that such person is not so interested or concerned must be added to the memorandum of acknowledgment.(a)

The 45 & 46 Vict. c. 39, and the rules made thereon, however, provide that a deed acknowledged before or after the commencement of the Act (1st Jan., 1883) by a married woman before a judge, or commissioner, is not to be impeached by reason only that such judge or commissioner was interested or concerned as a party, or as solicitor or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment.(b)

Prior to the 1st Jan., 1883, in addition to the acknowledgment, a separate certificate of the acknowledgment signed by the person or persons taking it, and an affidavit of verification, were necessary, which were filed in the central office of the High Court, and on filing the certificate, the deed, so far as regarded a disposition by the married woman, by relation took effect from the time of acknowledgment, and an office copy of the certificate was obtained, which went with the title deeds.(c) Since the above date, however, it is provided, by the Conveyancing Act, 1882, that where the memorandum of acknowledgment purports to be signed by the person authorised to take such acknowledgment, the deed, so far as regards the execution thereof by the married woman, is to take effect at the time of acknowledgment, and is to be conclusively taken to have been duly acknowledged.(d)

Where the concurrence of the husband in the deed is necessary, and such concurrence cannot be obtained in consequence of his lunacy, &c., or of his residence being unknown, &c., or for any other cause, the Court may by order dispense therewith. And all deeds, &c., executed by the wife in pursuance of the order are, subject to her husband's then existing rights,(e) as valid as if the husband had concurred.(f)

The application is made *ex parte* at Chambers (Queen's Bench Division) in the first instance.(g)

And the 44 & 45 Vict. c. 41, s. 39, enacts that notwithstanding a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to be for her benefit, and with her consent, by judgment or order, bind her interest in the property.

It has already been stated under what circumstances the restraint will be removed.(h)

And by sect. 40 of the Act it is enacted that, as to deeds executed after 31st December, 1881, a married woman, whether an infant or not,

(a) Conv. Rules, December 1882, rr. 1, 4.

(b) 45 & 46 Vict. c. 39, s. 7, sub-s. 3; Conv. Rules, December 1882, r. 6.

(c) 3 & 4 Will. 4, c. 74, ss. 85-88, which sections are now repealed by 45 & 46 Vict. c. 39, s. 7, sub-s. 4, and Sch.

(d) 45 & 46 Vict. c. 39, s. 7, sub-ss. 2, 4, 5, and Sch.

(e) See *Fowke v. Draycott*, 29 Ch. Div. 996; 54 L. J. 977, Ch.

(f) See 3 & 4 Will. 4, c. 74, s. 91; 20 & 21 Vict. c. 57, s. 2.

(g) R. S. C. Ord. LIV., r. 12.B. (Nov. 26, 1895).

(h) *Ante*, p. 17.

shall have power as if she were unmarried and of full age, by deed to appoint an attorney on her behalf to execute any deed or do any other act which she might herself execute or do, and the provision of the Act (a) relating to instruments creating powers of attorney are to apply thereto.

When all the necessary parties have duly executed the conveyance, in all ordinary cases, the purchaser of the whole estate is entitled to have the title deeds and documents, however ancient, in the possession or power of the vendor, delivered up to him; sect. 3 (6) of 44 & 45 Vict. c. 41 not affecting the former practice on this point.(b) If, however, the estate has been sold in lots, the purchaser of the lot or portion of highest value, is in the absence of stipulation to the contrary, entitled to the custody of the deeds; but under a condition that the purchaser of the largest lot shall have them, the purchaser of the largest lot in superficial area will be entitled to the deeds.(c) And, as before shown, when a vendor retains any part of an estate in land to which the documents of title relate, he is entitled to retain such documents.(d) In such cases the person retaining possession of the documents gives the acknowledgment and undertaking provided for by the 44 & 45 Vict. c. 41, s. 9, which has already (*ante*, pp. 149, 150) been fully considered; and if the purchaser requires attested or other copies of such documents to be delivered to him, he must bear the expense thereof, as stated, *ante*, p. 149.

A tenant in common or a joint tenant, who obtains possession of the title deeds, is entitled to retain them, but he will be bound to produce them for the inspection of any of his co-tenants, or for the satisfaction of a purchaser from any co-tenant.(e)

A tenant for life of unsettled land is entitled to the custody of the deeds when he has the legal estate (f); but the remainder man may under certain circumstances apply to inspect them and have them secured.(g) And a tenant for life of settled lands is entitled to the custody of the title deeds if he has the legal estate: and it seems also if he be merely equitable owner, on his undertaking not to part with them without the consent of the trustees of the settlement and to produce them when necessary. For the Settled Land Acts have given new powers and imposed new duties on tenants for life of settled lands,(h) which will be considered in subsequent pages.

(a) See sects. 46 to 48; *et ante*, p. 109.

(b) See Dart's V. & P. 762, 6th edit.; *Re Duthy and Jesson* (1898), 1 Ch. 419; 67 L. J. 218, Ch.; 46 W. R. 300.

(c) *Griffiths v. Hatchards*, 1 Kay & J. 17.

(d) 37 & 38 Vict. c. 78, s. 2 (5); *Re Williams or Fuller and Leathley's Contract* (1897), 2 Ch. 145; 66 L. J. 543, Ch.; 76 L. T. Rep. N. S. 646; 45 W. R. 672.

(e) *Lambert v. Rogers*, 2 Mer. 489; Dart's V. & P. 473, 6th edit.

(f) *Allwood v. Heywood*, 7 L. T. Rep. N. S. 640; 9 Jur. N. S. 108, Ex.

(g) Sug. V. & P. 444, 14th edit.

(h) *Re Burnaby's Settled Estate*, 42 Ch. Div. 621; 58 L. J. 664, Ch.; 61 L. T. Rep. N. S. 621; *Re Whythes, West v. Whythes* (1893), 2 Ch. 369; 62 L. J. 663, Ch.; 68 L. T. Rep. N. S. 520.

In the absence of evidence to the contrary, there is a legal presumption that a man knows the contents of a deed which he executes.(a)

Formerly, any alteration made in a material part of a deed after its execution by the grantor, even though made by a stranger, would render it void; but it has now been decided that the filling in of the date of the deed or of the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void even though done by the party to whom it has been delivered after its execution.(b) And where an estate has once been conveyed by deed, the subsequent alteration or destruction of the deed will not re-convey the estate, and the deed, though cancelled, may be given in evidence to show that the estate was conveyed by it; but after the deed has become void, no action can be brought upon any covenant in it.(c)

Escrow.—In some cases a deed is not delivered to a party to it, but to a third person to keep until something is done by the grantee, as the payment of money or the like. It is then said to be delivered as an *escrow*, that is, as a scroll or writing, which is not to take effect until the condition is performed, when it is delivered up, and it then operates from the time of its execution.(d) But it has recently been held that where there are several grantees and one of them is also solicitor to the grantor and to the other grantees, and the deed is delivered to him, evidence is admissible to show the character in which and the terms upon which the deed is so delivered.(e)

Registered Land.

As to the forms of transfer when land is registered under the Land Transfer Acts and Rules, and the practice on completion of a transfer, see *post*, tit. "Land Transfer Acts and Rules."

(a) Per Jessel, M. R., in *Re Cooper*; *Cooper v. Vesey*, 20 Ch. Div. 611, 629; 51 L. J. 862, Ch.; 47 L. T. Rep. N. S. 89; 30 W. R. 648.

(b) *Aldous v. Cornwall*, L. R. 3 Q. B. 573; Will. R. P. 151, 13th edit.

(c) Will. R. P. 176, 16th edit.; *Ward v. Lumley*, 1 L. T. Rep. N. S. 876.

(d) Shep. Touch. 58, 59; 1 St. Com. 465, 12th edit.

(e) *London, &c., Property Company v. Suffolk* (1897), 2 Ch. 608; 77 L. T. Rep. N. S. 445; 66 L. J. 790, Ch.; 46 W. R. 102, C. A.

CHAPTER IV.

MORTGAGES.

General Remarks.

THE duties of a solicitor when employed on behalf of a mortgagor are similar, in many respects, to those which devolve upon him when retained on behalf of a vendor. An important difference, however, is that a mortgagee cannot be tied down by any conditions or contract as to title or evidence of title.

It must also be remembered that the 37 & 38 Vict. c. 78, s. 1, does not in terms apply to a mortgage, but only to "any contract for the sale of land." And by sub-sect. 8 of sect. 3 of 44 & 45 Vict. c. 41, that section is only to apply to titles and purchases on sales properly so called, notwithstanding any interpretation^(a) in the Act. The rights of a mortgagee, therefore, remain as before in regard to title. And as a mortgagee merely advances his money upon property as a security for its due repayment with interest thereon, if there be any doubt as to the title or evidence of title, a solicitor should not allow his client to advance his money until all doubts are removed, and the value of the property offered in pledge is ascertained. And in advancing money by way of mortgage, the character of the borrower, as well as the nature of the security offered, and the title to it, must be looked at.

A second mortgage is not a desirable security, as the mortgagee does not get the legal estate, and he may be cut out by a right of tacking being exercised by a first mortgagee who has made a further advance without notice of a second mortgage; or by a third mortgagee who has advanced his money on the security of the property without notice of the second mortgage, and who pays off the first legal mortgage and takes a transfer thereof.^(b) So under a judgment for foreclosure in an action brought by a second incumbrancer, he will be compelled either to redeem the first mortgage, or to take his judgment subject to the first charge ^(c) unless the court decrees a sale.^(d)

(a) See sect. 2 (viii.).

(b) *Marsh v. Lee*, L. C. Eq. vol. 2; Coote, *Mortg.* 407, 889, 5th edit.

(c) *Sm. Ch. Pr.* 853, 7th edit.; *Seton, Decrees*, 1085, 4th edit.

(d) 44 & 45 Vict. c. 41, s. 25.

The court will not enforce specific performance of an agreement for a loan on mortgage against either the proposed lender,(a) or the proposed borrower.(b) But damages may be recovered for the breach of such an agreement to the extent of the loss actually incurred in respect of the proposed loan.(c) And the court will decree specific performance of a contract to execute a mortgage in consideration of money due or already advanced, although the mortgage deed is to contain an immediate power of sale.(d)

Originally mortgages were divided into two classes: the *vivum vadium* and the *mortuum vadium*. The former consisted of a feoffment of an estate to the creditor until out of the rents and profits he had satisfied his debt; upon which event the creditor's interest in the estate *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment. As neither the money nor the land were lost by the transfer it was called *vivum vadium*. This mode of security was, however, never general. The *mortuum vadium* became strictly an estate upon condition, that is, a feoffment of the land was made to the creditor in fee with a condition in the deed providing that on payment by the mortgagor or feoffor of a given sum at a time and place certain it should be lawful for him to re-enter. Under this conveyance the mortgagee became legal owner of the land subject to the condition. If the condition was performed the mortgagor re-entered and was in of his old estate. On the other hand, if the condition was broken the mortgagee's estate became absolute at law. In order to protect the mortgagor from eviction by the mortgagee a proviso was inserted in the deed declaring that until breach of the condition the mortgagor might hold the estate.(e)

At common law, as already stated, if the mortgagor did not fulfil the condition of the mortgage at the specified time the forfeiture was complete; and the mortgagee became the absolute owner of the estate whatever might be its extrinsic value compared with the mortgage debt.(f) In course of time, however, courts of equity saw the necessity of interfering to prevent such injustice, which was wholly irremediable at law. They arrived at the conclusion that a mortgage should be treated as a mere security for the debt due to the mortgagee, and that the mortgagee held the estate, although forfeited at law, as liable to be redeemed by the mortgagor on payment by him of what was due to the mortgagee for principal, interest, and costs, before the right was lost by lapse of time or

(a) *Larios v. Gursty*, L. R. 5 P. C. 346; Coote, Mort. 211, 5th edit.; *South African Territories v. Wallington*, 67 L. J. 470, Q. B.; 78 L. T. Rep. N. S. 426; (1898) A. C. 309.

(b) *Rogers v. Challis*, 27 Beav. 175.

(c) *Duckworth v. Ewart*, 10 Jur. N. S. 214; *South African Territories v. Wallington*, sup.

(d) *Ashton v. Corrigan*, L. R. 13 Eq. 76; 41 L. J. 96, Ch.; *Herman v. Hodges*, L. R. 16 Eq. 18; 43 L. J. 122, Ch.; 21 W. R. 571.

(e) Coote, Mortg. 5-8, 5th edit.

(f) Coote, Mortg. 8, 13, 5th edit.; St. Eq. sect. 1012, 2nd Eng. edit.

by fraud, which right is termed an equity of redemption.(a) And so inseparable is this right from a mortgage, that it cannot be disannexed even by an express arrangement between the parties, the rule being "once a mortgage always a mortgage."(b)

At the present day a legal mortgage of freehold property is a conveyance thereof by a mortgagor to a mortgagee as a security for a present advance or for money already due, subject to a proviso for re-conveyance thereof, on payment of the amount due with interest thereon on a day named (usually six months) from the date of the deed; with covenants by the mortgagor, express or implied, for payment thereof, and with absolute covenants for title.

The variations in the above form as to leaseholds and copyholds respectively will be stated in subsequent pages.

By the Conveyancing Act, 1881, s. 2 (vi.), mortgage includes any charge on any property for securing money or money's worth; and mortgagor includes any person deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, &c., in the mortgaged property; and mortgagee includes any person deriving title under the original mortgagee.

Conditional Purchase.

A transaction may, however, be a conditional or defeasible purchase as distinguished from a mortgage. And in such case the vendor will be strictly kept to his contract, and will not have the same right of redemption as is allowed to a mortgagee. But the line of demarcation between the two transactions is not very broad; in every case the question is what upon a fair construction is the meaning of the instrument.(c)

The fact of payment of the costs of the conveyance by the grantor raises a *prima facie*, but not a conclusive presumption on the point.(d) A conveyance absolute on its face will be turned into a mortgage, if the real intention was that it should be held as a security for money.(e) Payment of interest will be evidence that the transaction was intended to be a mortgage.(f)

Right of Preemption.

The mortgagee is not permitted to enter into a contract with the mortgagor at the time of the loan for the absolute purchase of the lands

(a) Story's Eq., s. 1013, and n., 2nd Eng. edit.; *Casborne v. Scarfe*, 1 Atk. 605; 2 L. C. Eq. 6, 9, 7th edit.

(b) Story's Eq., s. 1019; *Howard v. Harris*, 2 L. C. Eq. 1178, 6th edit.; *Salt v. Marquis of Northampton* (1892), A. C. 1, 19; 61 L. J. 49, Ch.; 40 W. R. 529.

(c) *Gossip v. Wright*, 8 L. T. Rep. N. S. 627; 11 W. R. 632; *Coote, Mortg.* 20, 22, 5th edit.

(d) *Alderson v. White*, 2 De G. & J. 97.

(e) *Douglass v. Culverwell*, 4 De G. F. & J. 20; 6 L. T. Rep. N. S. 272.

(f) *Allenby v. Dalton*, 5 L. J. 312, K. B.

for a specified sum in case of default made in payment of the mortgage money at the appointed time.(a) But an agreement by the mortgagor in case he determines to sell, to give the mortgagee a right of preemption, may be enforced. For the option to sell is left with the mortgagor, and he is not tied down as to price, and instead of selling, he may redeem.(b)

Mutuality and Redemption.

It is a rule, subject to certain exceptions, that a mortgage cannot be a mortgage on one side only, it must be mutual; that is, it must be a mortgage with both. Thus, it has been shown (*ante*, p. 181) that the mortgagor has a right of redemption given him; but he may by stipulation be prevented from redeeming for a fixed period, as for five years(c); and he cannot compel the mortgagee to receive payment before the day named in the mortgage deed(d); and if the mortgagee is not paid off on the day named he is usually entitled to six months' notice before payment can be made, or to six months' interest in lieu thereof(e); unless the mortgage is an equitable one created by a deposit of title deeds; for then the rule does not apply. The reason for the difference being that in the case of a regular mortgage by deed the inference is that the loan is intended to be of a permanent character; but it is otherwise in the case of an equitable mortgage by deposit of deeds only.(f) If the money be not tendered on the day of the expiration of the notice, the mortgagee is entitled to another six months' notice or to interest.(g)

A mortgagee who has demanded payment of his debt, or who has taken steps to enforce payment, as by entering into possession of the mortgaged property, cannot refuse a tender of his principal, interest, and costs on the ground that he is entitled to six months' notice or to six months' interest; for by his acts he has deprived himself of either.(h)

Where a mortgage deed contains a stipulation that payment of the principal money shall not be required by the mortgagee until the expiration of a given time from the date of the deed, "if in the meantime every half-yearly payment of interest be punctually paid," this means

(a) Coote, *Mortg.* 20, 5th edit.; 2 L. C. Eq. 1185, 6th edit.; *Willett v. Winnell*, 1 Vern. 488.

(b) *Orby v. Trigg*, 9 Mod. 2; Coote, *Mortg.* 20, 5th edit.

(c) See *Teevan v. Smith*, 20 Ch. Div. 724, 729; 51 L. J. 621, Ch.; *Biggs v. Hoddinott* (1898), 2 Ch. 307; 67 L. J. 540; 79 L. T. Rep. N. S. 201.

(d) Coote, *Mortg.* 26, 5th edit.

(e) *Smith v. Smith* (1891), 3 Ch. 550; 60 L. J. 694, Ch.; 65 L. T. Rep. N. S. 334; 40 W. R. 32.

(f) *Fitzgerald's Trustees v. Mellersh* (1892), 1 Ch. 385; 61 L. J. 231, Ch.; 66 L. T. Rep. N. S. 178; 40 W. R. 251.

(g) Spence, Eq. 652; Robbins, *Mortg.* 710.

(h) *Letts v. Hutchins*, L. R. 13 Eq. 176; *Bovill v. Endle* (1896), 1 Ch. 648; 65 L. J. 542, Ch.; but see *Hill v. Rowlands* (1897), 2 Ch. 361; 66 L. J. 689, Ch.; 77 L. T. Rep. N. S. 34, C. A.

paid on the day the interest becomes due, and if not paid for nine days thereafter, a notice calling in the mortgage debt is valid.(a)

Again, although the mortgagor conveys the property to the mortgagee subject to the equity of redemption, in equity, as before stated, the mortgagor is considered as the real owner of the property, subject to the mortgage debt. He may convey, entail, or devise his equitable interest, subject to the mortgage debt; and if he sells he may do so subject to such debt or pay it off out of the purchase money, if sufficient. And such an interest is liable to tenancy by the curtesy, and since 3 & 4 Will. 4, c. 105, s. 2, also to dower.(b) And certain powers of leasing, &c., have been given to mortgagors by statute, as will be shown fully subsequently.

Of Interest and Collateral Advantages.

The mortgage deed should, if not by way of statutory mortgage, contain a covenant for payment of interest so long as any principal money remains due. But even if there be no such covenant the mortgagee is, as a rule, entitled to interest from the date of the deed, at least by way of damages.(c) If, however, the mortgagee refuses to receive his debt after due notice and tender, interest will cease from the time the tender is made, provided the mortgagor keeps the money ready and makes no profit of it.(d)

Where a mortgage deed made no provision for interest, and the mortgagee thereby agreed upon payment of the principal to recovery, it was held that the mortgage carried no interest.(e)

Since the repeal of the usury laws by 17 & 18 Vict. c. 90, any amount of interest, as such, may be reserved.(f)

It was formerly a rule of equity that no person under colour of a mortgage could obtain a collateral advantage not strictly belonging to the contract of mortgage. Therefore a mortgagee was not permitted in the first instance to stipulate that if the interest be not paid at the appointed times it should be converted into principal and interest charged upon it. After the interest had become due, however, this could be done by written agreement between the mortgagor and mortgagee.(g) In the case of *Clarkson v. Henderson*,(h) which was a mortgage of a reversionary interest,

(a) *Leeds and Hanley Theatre v. Broadbent*, 77 L. T. Rep. N. S. 665; 67 L. J. 185, Ch.; 46 W. R. 230; (1898), 1 Ch. 343.

(b) *Howard v. Harris*, 2 L. C. Eq. 11, *et seq.*, 7th edit.; Story's Eq., s. 1015; *Casborne v. Scarfe*, 2 L. C. Eq. 6, 9, 31, 7th edit.

(c) Coote, Mortg. 941, 5th edit.; 2 David. Conv. 46, pt. 2, 4th edit.; *Re Roberts*; *Goodchap v. Roberts*, 14 Ch. Div. 49; 42 L. T. Rep. N. S. 666; 28 W. R. 870.

(d) Coote, Mortg. 959, 5th edit.; Robbins, Mortg. 711; *Garforth v. Bradley*, 2 Ves. 675, 678.

(e) *Thompson v. Drew*, 20 Beav. 49.

(f) *Mainland v. Upjohn*, 41 Ch. Div. 126, 143; 58 L. J. 361, Ch.; 60 L. T. Rep. N. S. 614.

(g) See notes to *Howard v. Harris*, 2 L. C. Eq. 1184, 6th edit.

(h) 14 Ch. Div. 383; 49 L. J. 289, Ch.

a covenant in the mortgage deed to capitalise interest was held valid. No reason was, however, given by the learned judge who decided the case for departing from the former rule hereon; and in the recent case of *Mainland v. Upjohn* (a) the former rule was recognised by Kay, J., who seemed to think that *Clarkson v. Henderson* (b) turned on the ground that it was a mortgage of a reversion.

A clause in the mortgage deed which provides that interest on the debt shall be paid at the rate of four per cent. per annum, and if not regularly paid, then at five per cent. per annum, is not binding on the mortgagor, being regarded as in the nature of a penalty. But the same end may be attained by reserving the higher rate of interest in the first instance, with a proviso that it shall be reduced to four per cent. per annum if regularly paid.(c)

And where the mortgage deed is framed for a reduction of interest on punctual payment, and the mortgagee takes possession on account of the default of the mortgagor, he is, nevertheless, entitled to interest at the higher rate.(d)

It has also recently been decided that there is no general rule that an agreement or a provision in a mortgage deed, which gives the mortgagee some collateral advantage beyond payment of principal, interest, and cost, is void. Such an agreement is not invalid unless it clogs the equity of redemption, or is unconscionable or oppressive. Therefore where a mortgage of a licensed house by a publican to a brewer provided that the loan should continue for five years, and contained a covenant that the mortgagor should not during the continuance of the security sell on the premises beer other than that supplied by the mortgagee, it was held that the covenant was valid and could be enforced.(e)

And previously to this decision it was held that a mortgagee may at the time of the loan stipulate with his mortgagor that the mortgagee may deduct a commission on the sum or sums advanced in addition to interest on the amount advanced, and if actually deducted may be allowed, provided the parties are dealing on equal terms, and there is no improper pressure, or any unfair dealing on the part of the mortgagee.(f) But where the parties are not dealing on equal terms, and there is undue pressure exercised in the bargain for the collateral advantage, or if the bargain be tainted with champerty, it will be set aside.(g)

(a) *Supra*, p. 183.

(b) *Supra*, p. 183.

(c) 2 Sp. Eq. 631; 2 David. Conv., pt. 2, pp. 47, 329, 4th edit.; Robbins, *Mortg.* 129; *Wallingford v. Mutual Society*, 5 App. Cas. at p. 702.

(d) *Union Bank of London v. Ingram*, 16 Ch. Div. 53; 50 L. J. 74, Ch.; 43 L. T. Rep. N. S. 659; 29 W. R. 209.

(e) *Biggs v. Hoddinott* (1898), 2 Ch. 307; 67 L. J. 540, Ch.; 79 L. T. Rep. N. S. 201; where it was said the rule laid down in *Jennings v. Ward*, 2 Vern. 520, was too wide; see also *Santley v. Wilde* (1899), 2 Ch. 475; 81 L. T. Rep. N.S. 393, C. A.

(f) *Mainland v. Upjohn*, *sup.*

(g) *James v. Kerr*, 40 Ch. Div. 449; 60 L. T. Rep. N. S. 212; 58 L. J. 355, Ch.; 37 W. R. 279.

Accretions.

The mortgagee is entitled for the purpose of the security to all such interests as he may acquire either as accretions to or in place of his original interest.(a) Therefore, if a lord of a manor mortgages the manor in fee simple and pending the mortgage purchases and takes a surrender to himself in fee simple of copyholds held of the manor, the mortgagee will have the benefit thereof as security for his mortgage debt.(b) So in the case of a mortgage of leaseholds, if a new lease of the premises be obtained by the mortgagor the mortgagee will have the benefit thereof for the purpose of his debt.(c) So an engine let out on a hire and purchase agreement and affixed by means of screws and bolts to a concrete bed in freehold land after the mortgage for the purpose of driving a saw mill on the land was, in the absence of special circumstances, held to pass to the mortgagee.(d) And as to fixtures generally, see *post*.

The Nature of the Security.

The various properties which may be made the subject of a mortgage usually rank in the following order :

Freehold land and freehold houses held in fee simple.

Copyhold land and houses.

Long leasehold houses, if unfettered by heavy ground rents or burdensome covenants.

Property used for manufacturing purposes if held in fee, or for a long term of years, unfettered as above stated.

Life estates.

Reversions and remainders.

Policies of life assurance.

Personal chattels.

Freeholds and Copyholds.—As will be gathered from the above enumeration, freehold land and houses in fee are the most desirable as a security for money lent on mortgage. But copyhold land and houses, where the fine due on admittance is a nominal one, are almost as good a security as freehold. Should, however, the fine payable be an arbitrary one, that is, a sum not exceeding two years' improved value of the land, the property would not be a desirable security, for if the mortgagee wished to enforce his security he would have to be admitted tenant of the manor, and pay the fine.

Leaseholds.—In London and some other large towns leasehold houses for long terms of years are taken as a security for money lent on mortgage. However, a solicitor should, before advising his client to lend money on property of this tenure, ascertain whether the locality in which the houses

(a) Coote, Mort. 260, 5th edit. ; Fisher, Mort. 296, 4th edit.

(b) *Doe v. Pott*, 2 Doug. 709 ; Scriv. Cop. 6, 7th edit.

(c) Coote, Mortg. 268, 5th edit. ; Robbins, Mortg. 165 ; *Hughes v. Howard*, 25 Beav. 575.

(d) *Hobson v. Gorrings* (1897) 1 Ch. 183 ; 66 L. J. 114, Ch. ; 75 L. T. Rep. N. S. 610, C. A. ; but see *Wood v. Hewitt*, 15 L. J. 247, Q. B.

are situate is an improving one, that the lease is held on a low ground rent, and contains no burdensome or restrictive covenants. If these essentials are wanting, the security would not be an advisable one. And it must be remembered there is always the risk of the lease being forfeited by breach of the covenants therein.(a)

Business Premises.—Again, serious consideration is necessary before a solicitor can advise his client to advance money by way of mortgage on estates used for business or manufacturing purposes, as property of this nature is constantly fluctuating in value. During periods of commercial depression it is usually very difficult to realise securities of this kind. If taken as a security not more than one half the value of the property should be advanced upon it. It must be remembered, too, that if the trade machinery is included in such a mortgage, the deed may require registration under the Bills of Sale Acts, 1878 and 1882,(b) as will be fully shown in the next chapter.

Where business premises are the subject of a mortgage, and it is intended to pass the business and goodwill thereof, they should be expressly included. For where, under a building agreement for a lease of a hotel to be built, the hotel-keeper charged the "building agreement and premises comprised therein, and the hotel and buildings to be erected, and the lease," &c., with the repayment of the sum borrowed, and agreed to grant such a mortgage as the mortgagee's solicitor should require, it was held that the goodwill or business was not charged.(c) However, where a colliery company mortgaged to a banking company by sub-demise their lands, mines, and seams of coal, buildings and machinery, it was held that the *business* of the company passed to the mortgagees. For in this case differing from the previous case mentioned, unless the coal and the right to work it passed, what security could the mortgagees have? The coal would be useless without the right to work it.(d)

And on a mortgage of land, all things annexed so as to become fixtures pass with the mortgaged premises, and constitute a part of the mortgage security without being mentioned.(e) So on a mortgage of land and a manufactory and machinery, all machinery which is fixed to the freehold will pass, and registration under the Bills of Sale Acts is not necessary if no power be given to seize the machinery apart from the land and manufactory.(f)

(a) See *Hare v. Elms* (1893), 1 Q. B. 604; 62 L. J. 187, Q. B.

(b) 41 & 42 Vict. c. 31, s. 5; 45 & 46 Vict. c. 43, s. 8.

(c) *Whitley v. Challis* (1892), 1 Ch. 64; 61 L. J. 307, Ch.; 65 L. T. Rep. N. S. 838; 40 W. R. 291, C. A.; and see *Clarke v. White*, 68 L. J. 105 Ch.; (1899) 1 Ch. 316, to the same effect. But see *Pile v. Pile*; *Ex parte Lambton*, 3 Ch. Div. 36, C. A.

(d) *County of Gloucester Bank v. Rudry Merthyr Steam Coal Company* (1895), 1 Ch. 629; 64 L. J. 451, Ch. C. A.

(e) *Longstaff v. Meagoe*, 2 Ad. & E. 167.

(f) *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. 361, Ch.; 4 W. R. 387; *Re Yates*; *Batchelor v. Yates*, 38 Ch. Div. 112; 57 L. J. 697, Ch. C. A.; *Johns v. Ware*, 68 L. J. 155, Ch.; 80 L. T. Rep. N. S. 112; (1899) 1 Ch. 359.

The same law applies where the mortgage is of a leasehold interest for years.(a)

And as regards the general rule, there is no difference in respect of fixtures which are annexed by the mortgagor subsequent to the mortgage.(b)

And if a landlord agrees with his tenant that the latter may remove tenant's fixtures after the expiration of the tenancy, and then refuses to permit such removal, though this may give a right of action for the value of the fixtures against the landlord, it gives no such right of action against the landlord's mortgagees, who were such before the agreement, and did not consent thereto.(c)

Life Estates, &c.—Estates in which the owner has only an interest for his life are not (subject to the powers given to a tenant for life of settled lands, which will be fully detailed in the chapter on "Settlements") desirable as a security for money advanced by way of mortgage, being so uncertain in point of duration. When taken as a security, the mortgagor should be required to insure his life in some good insurance office, and the policy should be assigned to the mortgagee as a collateral security, and notice thereof be given to the insurance office.(d)

An estate in remainder or reversion, even though vested, is also undesirable as a mortgage security, as it neither gives an immediate right to possession, nor affords any fund for discharging either principal or interest, and the mortgagee, having no right to the custody of the title deeds, is liable to take subject to any incumbrances already created by the mortgagor, the existence of which the lender has no real means of discovering.(e) And, subject to the alteration made by the 31 Vict. c. 4, the bargain is liable to be set aside by the Court, if unfair, as already stated.(f) If the reversionary interest be contingent, the security offered is still more objectionable than when vested, as it may never be vested, and consequently fail altogether.

Life Policies.—A policy of life assurance standing alone affords an inadequate mortgage security, as there is, during the borrower's life, no fund to resort to for payment of the interest on the money advanced. In addition to which the punctual payment of the annual premiums on the policy have to be provided for.(g) So the mortgagor may do some act to avoid the policy during his life. It must also be seen that the assured had an insurable interest, as provided by 14 Geo. 3, c. 48. Every person has an insurable interest in his own life (h);

(a) *Ex parte Barclay*, 9 Ch. App. 576; 43 L. J. 137, Bk.; 23 W. R. 608; *Climpson v. Coles*, 23 Q. B. Div. 465; 58 L. J. 346, Q. B.; 61 L. T. Rep. N. S. 116.

(b) *Ackroyd v. Mitchell*, 3 L. T. Rep. N. S. 236; *Culwick v. Swindell*, L. R. 3 Eq. 249; 36 L. J. 178, Ch.

(c) *Thomas v. Jennings*, 66 L. J. 5 Q. B.; 75 L. T. Rep. N. S. 274; 45 W. R. 93.

(d) 30 & 31 Vict. c. 144, s. 3, *et post*.

(e) 3 Byth. & Jarm. Conv. 760, 4th edit.; *Low v. Bouverie* (1891), 3 Ch. 82; 60 L. J. 594, Ch.; 40 W. R. 50.

(f) See *ante*, p. 61.

(g) Coote, Mortg. 585, 5th edit.

(h) *Wainwright v. Bland*, 1 M. & W. 32.

as has also a creditor in the life of his debtor.(a) However, a security of this nature is sometimes taken to secure a pre-existing debt; or under a marriage settlement, where the trustees thereof are authorised to make advances out of trust moneys to the husband upon his effecting a policy of assurance on his life and assigning the policy to the trustees as a security for repayment of the advances. If an existing policy of life assurance is taken as a security, inquiry should be made at the insurance office to ascertain if there are any prior incumbrances on the policy. And notice of the assignment must also be given to the insurance office, in order to prevent a subsequent incumbrancer, without notice of the prior charge, gaining priority by giving notice of his incumbrance to the insurance office,(b) or of even losing the benefit of the policy by a payment by the company. But after such notice the mortgagee cannot be affected by payment to the mortgagor.(c)

A mortgage of a *chose in action*, as of the money due under a life policy, made in the ordinary form with a proviso for redemption and re-assignment, is an absolute assignment within the meaning of the Judicature Act, 1873, s. 25 (6); so as to enable the assignee after notice to sue in his own name at law for the amount assigned, when payable.(d) But until written notice of the assignment has been given to the debtor or holder of the fund by the assignee, he cannot so sue at law.(e)

Where an assignment is made of an interest in a fund, part of which is in the hands of trustees and part is in court, the assignee in order to complete his title must give notice to the trustees so as to affect the part in their hands, and as to the part in court, the assignee must obtain a stop order. Mere notice to the trustees as to the part in court will be ineffectual.(f)

It has already been stated (*ante*, p. 174) that where the subject of an assignment or mortgage by a *cestui que trust* is a *chose in action* merely, as stock or shares in a public company vested in trustees, &c., inquiry should be made of the trustees, &c., whether there has been any previous assignment or charge. It has also been stated that the trustees are not bound to answer such an inquiry, but may refer the querist to the *cestui que trust*. Also that on completion of the mortgage or charge notice should be at once given to the trustees, &c.(g)

(a) *Godsall v. Boldero*, Sm. L. O., vol. 2.

(b) *Dearle v. Hall*, 3 Rus. 1; *Consolidated Insurance Company v. Riley*, 1 L. T. N. S. 209; 1 Giff. 371; *Newman v. Newman*, 28 Ch. Div. 674; 54 L. J. 598, Ch.; 83 W. R. 505; *et ante*, p. 174.

(c) 30 & 31 Vict. c. 144, s. 3; *Liquidation Estates Co. v. Willoughby* (1898), A. C. 321; 67 L. J. 251, Ch.; 78 L. T. Rep. N. S. 329.

(d) *Tancred v. Delagoa Bay Company*, 23 Q. B. Div. 239; 58 L. J. 459, Q. B.; 61 L. T. Rep. N. S. 229; 38 W. R. 15; and see *Durham, Bros., v. Robertson* (1898), 1 Q. B. 765; 78 L. T. Rep. N. S. 437, C. A.; disapproving of *National Provincial Bank v. Harle*, 6 Q. B. Div. 626.

(e) 30 & 31 Vict. c. 144, s. 3; 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(f) *Mutual Life Assurance Company v. Langley*, 32 Ch. Div. 460; 54 L. T. Rep. N. S. 326.

(g) *Ante*, p. 174 *et supra*.

As a matter of prudence notice of the assignment or charge should be given to all the trustees; but it is not necessary to give notice of an equitable incumbrance on personalty to more than one of several trustees so long as the circumstances of the case remain unaltered by the death of that trustee.(a) And it has recently been held where an assignee of a reversion in land vested in trustees upon trust for conversion, gave notice of the assignment to both the trustees, that he did not lose his priority by the fact of a subsequent assignee for value without notice of the prior assignment having, after the death of both the trustees, given notice of his assignment to the new trustees, who were not aware of the prior assignment, for an assignee who has given notice to all the existing trustees is not bound to renew the notice on a change of trustees.(b)

Where there are two settlements, one original and the other derivative, an assignee of an equitable interest in personalty under the derivative settlement, should give notice of the assignment to the trustees of that settlement, and not to the trustees of the original settlement, though the fund under which the interest arises is still in the hands of the latter.(c)

Notice to the solicitor of the trustee is not sufficient unless there is an actual employment of the solicitor extending to receiving the notice.(d)

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44, things in action other than debts due or growing due to the bankrupt in the course of his business, are not to be deemed goods within his order and disposition.

Policies of assurance come within the definition of "things in action," and are therefore excepted from the reputed ownership clause of the above enactment.(e)

Personal Chattels.—Where personal chattels are taken as a security for money lent, the repayment thereof is usually secured by a registered bill of sale, which is treated of in the next chapter.

The Value of the Security.

Before advancing money by way of mortgage the value of the property which is offered as a security must (in addition to the sufficiency of the title) be ascertained by a duly qualified surveyor and valuer. It is not usual for a person who is the beneficial owner of the money to be advanced to lend more than two-thirds of the value of the property if it be freehold or perhaps copyhold land, and only one half if the property be houses or less if business premises. And now even in the case of land,

(a) *Meuz v. Bell*, 1 Hare, 73; 11 L. J. 77, Ch.; *Timson v. Ramsbottom*, 2 Keen, 35; *Ward v. Duncombe* (1893), A. C. 369; 62 L. J. 881, Ch.; 69 L. T. Rep. 121; 42 W. R. 59.

(b) *Re Wasdale*, 79 L. T. Rep. N. S. 522; 68 L. J. 117, Ch.; (1899) 1 Ch. 163; and compare with cases cited in note *supra*.

(c) *Stephens v. Green* (1895), 2 Ch. 148; 64 L. J. 546, Ch.; 43 W. R. 465.

(d) *Saffron Walden Building Society v. Rayner*, 14 Ch. Div. 406, 409; 49 L. J. 465, Ch.; 43 L. T. Rep. N. S. 3; 28 W. R. 681.

(e) *Ex parte, Ibbetson*, 8 Ch. Div. 519.

agricultural land has so depreciated in value that great care must be observed in ascertaining its value in the event of a sale being necessary.

If the proposed lender be a trustee he may, under the Trustee Act, 1893 (56 & 57 Vict. c. 53), (a) unless forbidden, invest the trust money on (*inter alia*) real or heritable securities in Great Britain or Ireland (sect. 1). And by sect. 5, a trustee having power to invest in real securities, unless expressly forbidden by the trust instrument, may invest, and is to be deemed to have *always had* power to invest (1) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition of re-entry, except for non-payment of rent; and (2) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864 (s. 5); and by sect. 6 he may, having power to invest in the purchase of or on mortgage of land, do so notwithstanding the same is charged with a rent under the Public Money Drainage Acts 1846 to 1856, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide to the contrary (sect. 6).

By "real securities" was meant a first legal mortgage of freehold or copyhold hereditaments of sufficient value (b); or, it seems, of freehold ground rents of houses (c); but prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59, s. 9), now repealed and re-enacted by sect. 5 of the Trustee Act of 1893 (56 & 57 Vict. c. 53), a trustee having power to invest on real securities was not justified in lending the trust money on leaseholds, as they were not held to come within the definition of real securities, unless they were for a long term of years at a peppercorn rent without any onerous covenants (d); and although the section is retrospective, the security must come within its provisions.

As to the value of the property, prior to 1888 trustees should not have advanced more than two-thirds of the actual value of the property if freehold land and one half if freehold houses (e); but by the Trustee Act, 1893, s. 8 (replacing sect. 4 of the Act of 1888), a trustee lending money on the security of any property on which he can lawfully lend, is not to be chargeable with a breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, if it appears that in making the loan the trustee was acting (1) upon a report of the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner

(a) Repealing and re-enacting 52 & 53 Vict. c. 32, s. 3, which latter statute re-enacted 22 & 23 Vict. c. 35, s. 32, also repealing and re-enacting 51 & 52 Vict. c. 59, s. 9.

(b) *Stickney v. Sewell*, 1 My. & Cr. 8; see Lewin on Trusts, 362, 363, 9th edit.

(c) Lewin on Trusts, 360, 9th edit.; Robbins, Mortg. 517.

(d) *Jones v. Chennell*, 8 Ch. Div. 492; *Leigh v. Leigh*, W. N. (1886), 191; 55 L. T. Rep. N. S. 634; 56 L. J. 125, Ch.

(e) *Stickney v. Sewell*, sup.; Lewin on Trusts, 357, 9th edit.

of the property, whether the surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and (2) that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report; and (3) that the loan was made under the advice of the surveyor or valuer expressed in the report (sect. 8). The valuation should be made for the purposes of the investment, and the surveyor should be employed by the trustees themselves.(a)

In lending money upon the security of leasehold property, a trustee is not to be chargeable with breach of trust only upon the ground that he dispensed wholly or partially with the production or investigation of the lessor's title; nor because in lending money upon the security of any property, he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted (sect. 8, sub-sects. 2, 3).

The section is also to apply to transfers of existing securities, as well as to new securities, and to investments made as well before as after the commencement of the Act, except where an action, &c., was pending with reference thereto on 24th December, 1888 (sect. 8, sub-sect. 4).

And where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is advanced thereon, the security is to be deemed an authorised investment for the smaller sum, and the trustee is only liable to make good the sum advanced in excess thereof with interest (sect. 9). There is a similar provision as to past transactions, as in sect. 8, sub-sect. 4, *supra* (sect. 9, sub-sect. 2). Formerly the ordinary course was for the court to order the property to be sold, and to make the trustee liable for any loss resulting.(b)

By the Trustee Act, 1894 (57 & 58 Vict. c. 10), a trustee is not to be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law (sect. 4). As to the previous law, see *Re Medland*.(c)

In the absence of an express power it is a breach of trust to invest on a contributory mortgage of freeholds.(d) A contributory mortgage is where the money is lent in distinct sums by different mortgagees, who are to be paid *pari passu*, and may be effected (1) by conveying the property to all the mortgagees, with a proviso for redemption on payment of the mortgage debts and interest to the several lenders, the mortgagor covenanting separately with them for payment thereof. (2) If, however, the lenders are numerous, it is usual to make the mortgage to trustees for

(a) *Re Walker*, 59 L. J. 386, Ch.; 62 L. T. Rep. N. S. 449; *Re Somerset* (1894), 1 Ch. 231; 63 L. J. 41, Ch.; 42 W. R. 145.

(b) *Re Whiteley*, 33 Ch. Div. 347; 12 App. Cas. 727.

(c) 41 Ch. Div. 476.

(d) *Webb v. Jonas*, 39 Ch. Div. 660; 57 L. J. 671, Ch.; *Re Massingberd's Settlement*, 63 L. T. Rep. N. S. 296, C. A.

the whole sum lent, the interest of the several lenders being ascertained either by a separate deed, or in the mortgage deed itself.(a)

And trustees should not lend on mortgage to one of themselves, as each must exercise an impartial judgment.(b) Nor should they lend money on a second mortgage.(c)

A solicitor should not advise as to the value of the proposed security, or he may render himself liable in case of loss.(d) But where a solicitor is acting for trustees it is, it seems, his duty to see that the security on which they propose to lend money is adequate in point of value and proper in point of form.(e)

Equitable Mortgages.

Where a loan is wanted at once, and for a short period only, an equitable mortgage created by deposit of title deeds may be resorted to.(f) Even a deposit of *part* of the title deeds may create an equitable mortgage.(g) In the case of copyholds, an equitable mortgage thereof may be created by a deposit of copies of the Court Rolls.(h)

Where an equitable mortgage by deposit of a lease is created, the equitable mortgagee cannot be compelled by the lessor to take a legal assignment, and is not liable in respect of the rent and covenants in the lease.(i)

By agreement, the deposit may be made to cover future advances.(k)

It seems that if upon an advance, deeds are delivered for the purpose of preparing a legal mortgage, such delivery operates as an equitable mortgage.(l)

Where there is no stipulation as to the payment of interest on a deposit of deeds to secure a loan, interest will be allowed at the rate of four per cent.(m)

An equitable mortgage may also be created by an agreement or direction in writing, showing the debtor's intention to make his lands or property a security for a debt or money advanced.(n)

When deeds are deposited as a security, a memorandum of deposit

(a) 2 David. Conv. 941, pt. 2, 3rd edit.; p. 385, 4th edit.

(b) *Stickney v. Sewell*, 1 M. & Cr. 8; Lewin on Trusts, 325, 8th edit.

(c) *Drosier v. Brereton*, 15 Beav. 222; Robbins, Mort. 523.

(d) *Brinsden v. Williams* (1894), 3 Ch. 185; 63 L. J. 713, Ch.

(e) *Stokes v. Prance* (1898), 1 Ch. 212, 223; 67 L. J. 69, Ch.; 77 L. T. Rep. N. S. 595.

(f) *Russell v. Russell*, 1 L. C. Eq. 773, 6th edit.; 2 Id., 78, 7th edit.

(g) *Lacon v. Allen*, 3 Drew. 579; 26 L. J. 18 Ch.

(h) *Russell v. Russell*, sup.

(i) *Moore v. Gregg*, 2 Phil. 717; 18 L. J. 15, Ch.

(k) *Ex parte Kensington*, 2 Ves. & B. 79.

(l) See cases collected, 1 L. C. Eq., sup.; Robbins, Mortg. 60.

(m) *Re Kerr*, L. R. 8 Eq. 331.

(n) Coote, Mortg. 336, 5th edit.; *Baynard v. Woolley*, 20 Beav. 583.

should accompany them, as it facilitates proof of the intention; but it is not essential, notwithstanding the 4th section of the Statute of Frauds.(a)

No solicitor should advise his client to lend money upon a security of this kind, unless he has good reason to believe the title to be a safe one, and that the borrower is the lawful owner of the property. And the solicitor should ascertain that the whole of the documents are deposited, for otherwise the depositor, by retaining some of them, and depositing them with a third party, might cause a claim as to priority to arise.(b)

If the equitable mortgage is perfected by a conveyance or surrender, the costs thereof fall upon the mortgagor.(c)

Merger.—There is no merger at law even of a lower in a higher security, if the remedy given by the latter is not co-extensive with that given by the former.(d)

An equitable mortgage of land registered under the Land Transfer Acts may be created by depositing the land certificate, office copy of registered lease, or certificate of charge, as will be shown *post*, tit. "Land Transfer Acts and Rules."

Of the Form and Contents of a Mortgage Deed.

The value of the property offered as a security being found sufficient and the title to it good, the next step taken by the solicitor for the mortgagee is to prepare the draft mortgage deed, and forward it to the solicitor for the mortgagor for his perusal and approval. However, before we proceed to state the practice further, we will now consider the form and requisites of the mortgage deed itself.

It will, however, be necessary first to state the effect of recent legislation whereby certain covenants and powers are implied or made incident to mortgages by deed of freehold or leasehold property, which were formerly inserted in a mortgage deed itself.

Statutory Mortgage.—And first as to a statutory mortgage. In simple cases, and for loans on small properties, no doubt the forms given by the 44 & 45 Vict. c. 41 will be used. The third schedule to the Act gives a form of statutory mortgage of freehold or leasehold land (set out *post*); and on such a mortgage by deed *expressed* to be made by way of *statutory* mortgage in such form (e), there is to be deemed to be included, and to be implied, (1) a covenant with the mortgagee, by the person expressed therein to convey as mortgagor, to the effect that the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with

(a) Story's Eq., s. 1020; *Russell v. Russell*, *sup.*

(b) *Dixon v. Muckleston*, 8 Ch. App. 155; 42 L. J. 210, Ch.; 21 W. R. 178; 27 L. T. Rep. N. S. 804.

(c) *Pryce v. Bury*, 2 Drew. 41; also set out in L. R. 16 Eq. 153, n.

(d) *Chetwynd v. Allen* (1899), 1 Ch. 353; 80 L. T. Rep. N.S. 110.

(e) It will be noticed that a statutory mortgage can only be made by deed and of freehold or leasehold land.

interest thereon in the meantime at the stated rate, &c. ; and (2) a proviso that if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest at the stated rate, the mortgagee will, at any time thereafter, at the request and cost of the mortgagor, reconvey the mortgaged property to him, or as he shall direct (sect. 26).

Covenants Implied.—And by sect. 7, sub-s. 1 (C), in a conveyance by way of mortgage, a covenant by a person who conveys and is *expressed* to convey as beneficial owner (mortgagor), is to be deemed to be included and implied in the conveyance, as far as regards the subject-matter, or share of the subject-matter, expressed to be conveyed by him, with the person to whom the conveyance is made (mortgagee) the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, (1) full power to convey, &c., and (2) that if default be made in payment of the mortgage money or interest, or any part thereof, that the mortgagee, and persons deriving title under him, may enter into peaceable and quiet possession of the mortgaged property ; (3) and that freed from all incumbrances, and (4) that the mortgagor will at the request of the mortgagee do all acts, necessary acts, for further assuring the mortgaged property.

And by the same section (D), in a conveyance by way of mortgage of leasehold property, the further covenant, by a person who conveys and is expressed to convey as beneficial owner (mortgagor), that the lease or grant creating the term or estate is at the time of the conveyance a good and valid lease, &c., and in full force, unforfeited, and unsurrendered, not void or voidable, and that the rents reserved by, and the covenants, &c., contained in the lease or grant on the lessee's or grantee's part, &c., have been paid, observed, and performed up to the time of the conveyance ; and that the mortgagor and those deriving title under him will, so long as any mortgage money remains due, pay the rents reserved by, and perform the covenants, &c., contained in the lease or grant, on his and their part to be paid, observed, and performed, and will keep the mortgagee, and those deriving title under him, indemnified against all actions, proceedings, costs, &c., if any, incurred or sustained by him or them by reason of the non-payment of such rents or non-observance or non-performance of such covenants, &c.

And by sect. 28 of the Act, as will be fully shown in subsequent pages, in a deed of statutory mortgage or statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, &c., the implied covenant on their part is deemed joint and several, &c.

Power to Lease.—The same Act, sect. 18, also enacts that a mortgagor of land, (a) while in possession, shall as against every incumbrancer, have power to make such leases of the mortgaged land, or any part thereof, as is stated *infra* (sub-sect. 1) ; and a mortgagee of land, while in

(a) Land includes land of any tenure, and tenements and hereditaments corporeal and incorporeal, and houses and other buildings, &c., unless a contrary intention appears (sect. 2, ii.).

possession, shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make similar leases (sub-sect. 2). These leases are :

(1) An agricultural or occupation lease for any term not exceeding twenty-one years.

(2) A building lease for any term not exceeding ninety-nine years (sub-sect. 3).

Every such lease must be made to take effect in possession not later than twelve months after its date; and reserve the best rent that can reasonably be obtained, but without any fine taken; and must contain a covenant by the lessee for payment of rent, and a condition of re-entry on default thereof within a time specified, not exceeding thirty days. A counterpart of the lease must be executed by the lessee and be delivered to the lessor; the execution of the lease by the lessor being sufficient evidence thereof in favour of the lessee and all persons deriving title under him (sub-sects. 4-8).

A building lease must be made in consideration of the lessee, &c., having erected, or agreeing to erect within not more than five years from the date of the lease, new or additional buildings, or having improved or repaired buildings, or agreeing to improve or repair them within that time, or having executed or agreeing to execute within that time an improvement on the land for or in connection with building purposes. The rent for the first five years, or any less part of the term, may be a peppercorn or nominal rent, or other rent less than the rent ultimately payable (sub-sects. 9, 10).

Where a lease is made by a mortgagor, he must, within a month after making it, deliver to the mortgagee, or to the mortgagee first in priority, if more than one, a counterpart of the lease executed by the lessee. The lessee is not, however, to be concerned to see that this provision is complied with (sub-sect. 11); but if the mortgagor makes default therein, the statutory power of sale arises (sect. 20, iii.).

Sect. 18 applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, &c. (sub-sect. 13); and nothing in the Act is to prevent further or other powers of leasing being reserved by the mortgage deed to the mortgagor or mortgagee, or both; and any further or other powers so reserved are to be exercisable, as far as may be, as if conferred by the Act, and with all the like incidents, &c., unless a contrary intention is expressed in the mortgage deed (sub-sect. 14).

Nothing in the Act is to be construed to enable a mortgagor or mortgagee to make a lease for any longer term, or on any other conditions, than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if the Act had not been passed (sub-sect. 15).

Sect. 18 applies only to mortgages made after the commencement of the Act; but the provisions thereof may, by written agreement after the commencement of the Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of the Act, if the agree-

ment does not prejudicially affect the right or interest of any mortgagee not joining in or adopting the agreement (sub-sect. 16).

The provisions of this section referring to a lease are to be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (sub-sect. 17).

The provisions of sect. 18 remove serious difficulties previously existing in granting leases of mortgaged property, and will be specially useful in reference to leases of buildings. But it will be noticed that the Act confers no power on either mortgagor or mortgagee to grant mining leases, which would work a diminution of the security.

The power given by sub-sect. 13 to exclude the power of leasing given by the Act should not be exercised as a matter of course. If the mortgaged property consists of houses or buildings in a town, especially if the security be scanty, the mortgagee may reasonably insert a clause requiring his consent to be obtained before a lease is granted by the mortgagor. And it should be remembered that if the power be wholly excluded the common law applies; and at common law neither mortgagor nor mortgagee can make a lease of the mortgaged premises that will bind the other, save under a power conferred upon him by the other. And if the mortgagor alone should after the mortgage grant a lease, not under such a power, the mortgagee cannot distrain or sue for rent due from the tenant, unless the tenant attorns to him, and then the remedy is usually only for the rent accruing due after attornment.^(a) And a tenant who remains in possession after notice by the mortgagee to pay rent to him is not evidence of an agreement to become tenant to the mortgagee.^(b) But if he remains in possession and pays rent to the mortgagee a new tenancy from year to year is thereby created.^(c) And the mortgagee may, without notice, not only eject the mortgagor, but any of his tenants who became such after the mortgage, without the mortgagee's concurrence.^(d)

But now, by 53 & 54 Vict. c. 57, in case of tenancies from year to year or not exceeding twenty-one years, at a rack rent, under the Acts stated *infra*, and not binding on the mortgagee, he must, before depriving the tenant of possession of land otherwise than according to the terms of the lease, give him six months' written notice of his intention to do so; and compensation is to be due for crops and unexhausted improvements, to be determined as under the Agricultural Holdings Act, 1883, or the Allotments Act, 1887; and may be set-off, &c. (sects. 1, 2, sub-sect. 2).

If the lease be granted before the mortgage, the mortgagee being assignee of the reversion may, irrespective of the Conveyancing Act, 1881,

(a) See *Keech v. Hall*, 1 Sm. L. C. 546, and notes, 9th edit.; Coote, *Mortg.* 775, 776, 777, 808, 5th edit.; Woodf. L. and T. 55, 457, 16th edit.

(b) *Towerson v. Jackson* (1891), 2 Q. B. 484; 61 L. J. 36 Q. B.; 65 L. T. Rep. N. S. 332; 40 W. R. 37; a case where the power given by the Act was excluded.

(c) *Corbett v. Plowden*, 25 Ch. Div. 678; 54 L. J. 109, Ch.; 50 L. T. Rep. N. S. 740; 32 W. R. 667, C. A.

(d) *Keech v. Hall*, *sup.*; *Corbett v. Plowden*, *sup.*

after giving notice to the tenant distrain for rent accruing due after the assignment, but not for rent due before the assignment, without express words therein.(a) And where the lease by the mortgagor takes effect under the power in the Conveyancing Act, the mortgagee may, on giving notice to the tenant of going into possession, enforce the covenants and provisions in the lease, as if made with him.(b)

If mortgagee and mortgagor should concur in granting a lease, as where the mortgage was made before the operation of the Conveyancing Act, 1881, or is of mining property; or when the leasing power thereby given is negatived, the reddendum should still be framed generally, without saying to whom, and the law will carry the rent to the owner of the reversion.(c) The lessee is sometimes made to covenant with the mortgagee and also by way of separate covenant with the mortgagor. A proviso is added that the rent may be paid to the mortgagor until notice by the mortgagee requiring the rent to be paid to him, and until such notice the mortgagor is to have a remedy by distress, &c., for the rent.(d)

Power of Sale.—By sect 19, where a mortgage is made by deed, the mortgagee is to have the following powers, to the same extent as if conferred by the mortgage deed; to be exercised, however, only in the events and under the conditions mentioned in subsequent sections:

(1) A power, when the mortgage money has become due, to sell, or concur in selling, the mortgaged property, or any part of it, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions as to title, &c., as the mortgagee thinks fit, with power to vary or rescind the contract of sale, to buy in and resell, without being answerable for any loss occasioned thereby.

Power to Insure.—(2) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire, any insurable part of the mortgaged property, whether affixed to the freehold or not, and the premiums paid for any such insurance are to be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate as the mortgage money.

Power to Appoint a Receiver.—(3) A power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property or any part thereof.(e)

(a) *Moss v. Gallimore*, 1 Sm. L. C. 497, 10th edit.; *Salmon v. Dean*, 3 Mac. & G. 344; *Robbins, Mortg.* 671.

(b) *Municipal Permanent Building Society v. Smith*, 22 Q. B. Div. 70; 58 L. J. 61, Q. B.; 37 W. R. 42.

(c) *Whitlock's Case*, 8 Co. Rep. 71, a; 2 Platt, Leases, 88, 99; *Robbins, Mortg.* 674; *Woodf. L. & T.* 385, 13th edit.; 414, 16th edit.

(d) 5 David. Conv. 159, 160, 161, pt. 1, 3rd edit.; 2 Prid. Conv. 65, 14th edit.

(e) Although power is thus given to the mortgagee to appoint a receiver without coming to the Court, yet if an action be pending respecting the property, it has been held that it is more desirable that the receiver should be appointed by the Court (*Tillet v. Nison*, 25 Ch. Div. 238; 49 L. T. Rep. N. S. 598, 32 W. R. 226).

Power to Cut Timber.—(4) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, not planted or left standing for shelter or ornament, or to contract for such cutting and sale, to be completed within twelve months from the making of the contract.

Variation of Powers.—The provisions of the Act relating to the foregoing powers may be varied or extended by the mortgage deed, and, as so varied or extended, are to operate in like manner and with the like incidents, &c., as if contained in the Act. This section (19) only applies where the mortgage deed is executed after the commencement of the Act, and only if and as far as a contrary intention is not expressed in the mortgage deed (see sub-sects. 1-4).

These sections are in substitution for the 23 & 24 Vict. c. 145, ss. 11-24, being part 2 of that Act, which part is repealed by 44 & 45 Vict. c. 41, s. 71. The powers given by the latter Act are more complete and extensive than those given by the repealed Act.

Exercise of Power of Sale.—The mortgagee cannot exercise the power of sale conferred by the Act unless and until (1) written notice requiring payment of the mortgage money has been served on the mortgagor (a), or one of several mortgagors, and default made in payment thereof, or of part thereof, for three months after service; or (2) some interest under the mortgage is in arrear and unpaid for two months; or (3) there has been a breach of some provision contained in the mortgage deed, or in the Act, on the part of the mortgagor, or of someone concurring in the mortgage, to be observed or performed, other than and besides the covenant for payment of principal or interest: (44 & 45 Vict. c. 41, s. 20).

Mortgagor includes a person deriving title under the original mortgagor, or entitled to redeem (sect. 2, vi.).

When the mortgagee exercises the power of sale conferred by this Act, he has power by deed, to convey the property sold for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights ranking after his mortgage, but subject to such estates and interests and rights as have priority to his mortgage; except that in the case of copyhold or customary land, the legal right to admittance is not to pass by a deed under this section, unless a deed is sufficient otherwise by law, or by custom in that behalf (sect. 21, sub-sect. 1).

Customary freeholds in some cases will pass by deed of grant, in others by bargain and sale, the title being, however, completed in each case by admittance.(b)

Under the power of sale given by the Act the mortgagee will proceed as under the ordinary power of sale in a deed.

(a) The notice must be in writing, and may be addressed to the mortgagor, by that designation, without his name, and may be left at his last known place of abode or business in the United Kingdom, or may be affixed or left for him on the land or any house or building comprised in the mortgage: (44 & 45 Vict. c. 41, s. 67, sub-ss. 1, 2, 3).

(b) Burt. Comp. pl. 1288; Scriv. Cop. 17, 18, 7th edit.

Where a conveyance is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser cannot be impeached on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or irregular exercise of the power has his remedy in damages against the person exercising the power: (44 & 45 Vict. c. 41, s. 21, sub-s. 2).

The proceeds of the sale, after the discharge of prior incumbrances, to which the sale is not made subject, if any, or after payment into court under the Act of a sum to meet any prior incumbrance, are to be held by the mortgagee in trust to be applied by him (1) in payment of the costs and expenses properly incurred as incident to the sale or attempted sale; (2) in discharge of the mortgage money, interests and costs, and other money, if any, due under the mortgage; and (3) the residue thereof is to be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof (sub-sect. 3).

Sect. 5 of the Act provides for the payment of money into court on a sale of incumbered property, the amount paid in being fixed by the court. After the money is paid in, the court has power with or without notice to the incumbrancer, to declare the land freed from the incumbrance, and to make an order for conveyance, or vesting order, to give effect to the sale, and give directions for the retention and investment of the money in court. After notice to the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled thereto, &c. (see sub-sects. 1-4, and sect. 69; *et ante*, p. 174).

The power of sale conferred by the Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money (44 & 45 Vict. c. 41, s. 21, sub-s. 4). By sect. 30 of this Act mortgaged estates of inheritance, &c., on the death of a sole mortgagee, devolve to and become vested in his personal representatives, notwithstanding any testamentary disposition thereof, and they have power to dispose of and deal with the same, as if the same were a chattel real (sub-sect. 1). They may, therefore, exercise the power of sale given by the Act. Copyholds vested in a tenant on the Court Rolls are excluded from the section by 57 & 58 Vict. c. 46, s. 88, as already (a) shown.

The power of sale given by the Act does not affect the mortgagee's right of foreclosure (44 & 45 Vict. c. 41, s. 21, sub-sect. 5). The mortgagee, his executors, administrators, or assigns, are not to be answerable for any involuntary loss happening in the exercise of the power of sale conferred by the Act (sub-sect. 6).

When the power of sale conferred by the Act has become exercisable, the person entitled to exercise it may demand and recover from any person, other than one having in the mortgaged property an estate,

(a) *Ante*, p. 26.

interest, or right prior to the mortgage, all the deeds and documents relating to the property or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover (sub-sect. 7).

Receipt of Mortgagee.—The receipt in writing of a mortgagee is a sufficient discharge for any money arising under the power of sale conferred by the Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee is not to be concerned to inquire whether any money remains due under the mortgage. The money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage, is to be applied in like manner as in the Act directed respecting money received by him arising from a sale under the power of sale conferred by the Act (see *ante*, p. 199); but with this variation that the costs and expenses payable are to include the costs and expenses properly incurred in recovering and receiving the money or securities, and of converting securities into money, instead of those incident to a sale: (44 & 45 Vict. c. 41, s. 22, sub-ss. 1, 2.)

Thus, the mortgagee may not only give a discharge for money arising by a sale, but also for money or securities assigned by him.(a)

So long as anything remains due on the mortgage security a mortgagee may pursue all his remedies, even concurrently.(b)

As a rule a mortgagee will not be restrained by the Court from exercising his power of sale except on the terms of the mortgagor paying into Court the sum due for principal, interest, and costs; unless the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor; for in such event the Court will look to all the circumstances of the case, and will make such order as may be just (c); or unless the deed shows that the amount claimed is not due.(d)

A mortgagee should sell, it has been held, with a due regard to the interests of the mortgagor, but he is not a trustee of the power of sale for the mortgagor.(e) And he may sell under the usual condition that if objections are taken to the title which he is unable or *unwilling* to remove he shall be at liberty to rescind the contract of sale.(f) And he may in exercising his power of sale, sell under special or even stringent conditions, if not of a depreciatory character.(g)

If a mortgagee exercises his power of sale *bond fide* for the purpose of realising his debt, and without collusion with the purchaser, the Court will not interfere, even though the sale be disadvantageous, unless, indeed,

(a) See Wolst. & B. Conv. 73, 7th edit.

(b) *Lockhart v. Hardy*, 9 Beav. 349, 354; *Wood v. Wheeler*, 22 Ch. Div. 281; 52 L. J. 144, Ch.

(c) *Macleod v. Jones*, 24 Ch. Div. 289, 299; 49 L. T. Rep. N. S. 321, C. A.

(d) *Hickson v. Darlow*, 23 Ch. Div. 690; 48 L. T. Rep. N. S. 449.

(e) *Kennedy v. De Trafford* (1896), 1 Ch. 762; affirmed (1897) A. C. 181; 66 L. J. 418, Ch.

(f) *Falkner v. Equitable Reversionary Society*, 4 Drew. 354.

(g) *Kershaw v. Kellow*, 1 Jur. N. S. 974; *Hobson v. Bell*, 2 Beav. 17.

the price be so low as in itself to be evidence of fraud.(a) And the mortgagee may sell to one of several co-mortgagors for the exact amount of principal, interest, and costs.(b)

Still, he must exercise care, for if, in exercising his power of sale, he personally or by his agent, makes a mistake, such as a misdescription of the property, whereby a material diminution is caused in the price realised, he is liable to the parties interested in the equity of redemption for the loss so occasioned.(c)

An equitable mortgagee by deed may exercise the power of sale given by the Conveyancing Act, 1881, but he cannot convey the legal estate, as it remains in the mortgagor.(d)

A mortgagee selling under his power of sale is justified in taking a cheque from the purchaser in payment of the deposit; and if the sale proves abortive on account of the cheque being dishonoured, the mortgagee may add to his debt the costs occasioned by the abortive sale.(e)

A mortgagee in exercising his power of sale, is not, except as to the balance of the purchase money where there is no subsequent mortgage of which he has notice, a trustee for the mortgagor.(f) If there be a second mortgage of which the first mortgagee has notice, the latter is liable to such second mortgagee for the balance remaining of the proceeds of the sale after satisfying his principal, interest and costs.(g) And if he improperly retains such surplus in his hands he is liable to pay to the second mortgagee simple interest thereon at four per cent. per annum, unless the circumstances of any particular case show that this would be unjust.(h)

The Conveyancing Act, 1881, as already stated, provides that a conveyance made in professed exercise of the power of sale conferred by it, is not to be impeachable on the ground of irregularity (sect. 21, sub-sect. 2). The true construction of this sub-sect. is that it only protects a purchaser from a mortgagee vendor, who has obtained a conveyance without knowledge of any irregularity. Therefore the vendor is bound to show, on a purchaser's request, that his power of sale is exercisable under the statute.(i)

(a) *Warner v. Jacob*, 20 Ch. Div. 220; 51 L. J. 642, Ch.; 46 L. T. Rep. N. S. 565; *Kennedy v. De Trafford*, sup.

(b) *Kennedy v. De Trafford*, sup.

(c) *Tomlin v. Luce*, 43 Ch. Div. 191; 59 L. J. 164, Ch.; 62 L. T. Rep. N. S. 18; 38 W. R. 328.

(d) *Re Hodson and Howe*, 35 Ch. Div. 668; 56 L. J. 755, Ch.; 56 L. T. Rep. N. S. 837, C. A.

(e) *Farrer v. Lacy and Co.*, 25 Ch. Div. 636; 31 *Id.* 42; 53 L. J. 569, Ch.; 50 L. T. Rep. N. S. 121; 53 *Id.* 515, 34 W. R. 22, C. A.

(f) *Warner v. Jacob*, sup.; *Kennedy v. De Trafford*, sup.; see also 56 & 57 Vict. c. 53, s. 50.

(g) *West London Commercial Bank v. Reliance Building Society*, 29 Ch. Div. 954; 54 L. J. 1081 Ch.; 53 L. T. Rep. N. S. 442; 33 W. R. 916, C. A.

(h) *Eley v. Read*, 76 L. T. Rep. N. S. 39, C. A.

(i) *Life Interest, &c., Corporation v. Hand in Hand Insurance Co.* (1898), 2 Ch. 220; 78 L. T. Rep. N. S. 708; 67 L. J. 548, Ch.; 46 W. R. 668; see also *Parkinson v. Hanbury*, L. R., 2 H. L. Cas. 1; *Bailey v. Barnes* (1894), 1 Ch. 25; 63 L. J. 73, Ch.

The notice required to be given by sect. 20 may be waived or dispensed with by the person or persons entitled to receive it.(a)

Where a mortgagee vendor had included in the same mortgage deed land and a policy of life assurance, and sold the land under his power and retained the policy, it was held that the purchaser of the land was on completion entitled to have the mortgage deed delivered over to him; as the vendor retained no part of the "estate" within rule 5 of sect. 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), but only the policy of assurance.(b)

By the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 68, a mortgagee having a power of selling land may authorise the purchaser to make an application to be registered as first proprietor under the Act; or may himself apply to be registered as such proprietor, &c.; as will be fully shown *post*, tit. "Land Transfer Acts and Rules."

If a mortgagor purchases from the first mortgagee, selling under his power of sale, and there is subsisting a second mortgage, and the purchase money is not sufficient to pay off both the first and second mortgages, the purchase does not defeat the title and rights of the second mortgagee.(c)

And if there be two or more mortgages on an estate and the first mortgagee purchases and takes a conveyance to himself of the equity of redemption, he cannot, it has been held, set up his mortgage against any of the subsequent incumbrances of which he had notice (d); unless the property is conveyed to a trustee for the express purpose of keeping the mortgage alive.(e)

However, it may now be considered as settled that a mortgage is not necessarily merged by the mortgagee taking a conveyance of the equity of redemption, without a saving declaration; the question being one of intention. For if the purchaser of an equity of redemption pays off a mortgage upon it and takes an assignment thereof, the question whether the charge is to be treated as extinguished or kept alive for his benefit is a question of intention. Such intention may be found in the deed itself, as from an express declaration, or in the circumstances attending the transaction; or the intention may be presumed from considering whether it is or is not for his benefit that the charge should be kept alive.(f)

A mortgagee selling under his power of sale may allow part of the purchase money to remain on mortgage of the property, but it is

(a) *Re Thompson and Holt*, 44 Ch. Div. 492; 59 L. J. 651, Ch.; 62 L. T. Rep. N. S. 651; 33 W. R. 524.

(b) *Re Williams, &c., or Fuller and Leathely's Contract* (1897), 2 Ch. 144; 66 L. J. 543, Ch.; 76 L. T. Rep. N. S. 646; 45 W. R. 627.

(c) *Otter v. Lord Vaux*, 2 Kay & J. 650; 6 De G. M. & G. 638; and see *Bell v. Sunderland Building Society*, 24 Ch. Div. 618; 53 L. J. 509, Ch.; 49 L. T. Rep. N. S. 555.

(d) *Toulmin v. Steere*, 3 Mer. 210; 2 David. Conv. 324, pt. 1, 4th edit.

(e) *Bailey v. Richardson*, 9 Hare, 734; 2 David. Conv., *sup*.

(f) *Thorne v. Cann* (1895), A. C. 11; 64 L. J. 1 Ch.; 71 L. T. Rep. N. S. 852; *Liquidation Estates Company v. Willoughby* (1898), A. C. 321; 67 L. J. 251, Ch.; 78 L. T. Rep. N. S. 329; 46 W. R. 539.

advisable that the sale and mortgage should be carried out by distinct instruments.(a)

Exercise of Power of Insurance.—Under the power in the Act enabling a mortgagee to insure against loss or damage by fire, the amount of insurance must not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, must not exceed two-thirds of the sum that would be required to restore the property in case of total destruction: (44 & 45 Vict. c. 41, s. 23, sub-s. 1).

The mortgagee is also prohibited from insuring under the power given by the Act (1) where the mortgage deed contains a declaration that no insurance is required; (2) where the mortgagor keeps up an insurance in accordance with the mortgage deed; or (3) there being no stipulation as to insurance in the mortgage deed, the mortgagor nevertheless keeps up an insurance to the amount in which the mortgagee is by the Act authorised to insure (sub-sect. 2).

The insurance money, whether received on an insurance effected under the mortgage deed or under the Act, must, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage for which the money is received; and subject to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage (sub-sects. 3, 4).

As to an obligation imposed by law, the 14 Geo. 3, c. 78, provides that insurance money on houses and buildings must, at the request of any person interested, or in case of suspicion may, be applied in reinstating the houses or buildings (sect. 83). This has been held to be a general enactment, and is not confined to the Metropolitan district.(b)

Exercise of Power to appoint a Receiver.—When the mortgagee is entitled to appoint a receiver under the power conferred by the Act, he cannot exercise that power until he has become entitled to exercise the power of sale conferred by the Act; but then he may, by writing under his hand, appoint such person as he thinks fit to be receiver. Such receiver is to be deemed to be the agent of the mortgagor, who is to be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides (44 & 45 Vict. c. 41, s. 24, sub-ss. 1, 2).

The receiver has power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or mortgagee, to the full extent of the mortgagor's disposable estate or interest, and to give effectual receipts for the same; and the persons paying the money need not inquire whether any case has happened to authorise the receiver to act (sub-sects. 3, 4).

(a) *Davey v. Durrant*, 1 De G. & J. 535; *Thurlow v. Mackeson*, L. R. 4, Q. B. 97; 38 L. J. 57, Q. B.; 17 W. R. 280.

(b) *Ex parte Gorely*, 4 De G. J. & S. 477; 11 L. T. Rep. N. S. 319; 34 L. J. 1, Bk.; 13 W. R. 60; but see *Westminster Fire Office v. Glasgow, &c., Society*, 13 App. Cas., p. 716; *et ante*, p. 54.

The receiver may be removed, and a new one appointed from time to time by the mortgagee by writing under his hand (sub-sect. 5).

The receiver may retain out of moneys received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at a rate specified in his appointment, not exceeding five per cent. on the gross amount received, and, if no rate is specified, then at the rate of five per cent. on that gross amount, or at such higher rate as the court may allow, on application made by him for that purpose (sub-sect. 6).

The receiver must, if directed in writing by the mortgagee, insure the mortgaged premises of an insurable nature against loss or damage by fire out of money received by him (sub-sect. 7).

The receiver must apply all moneys received by him as follows: (1) in discharge of all rents, taxes, rates, and outgoings affecting the mortgaged property; (2) in keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; (3) in payment of his commission, and of the premiums on fire, life, or other insurances, properly payable under the mortgage deed or the Act, and the cost of necessary or proper repairs directed in writing by the mortgagee; (4) in payment of the interest accruing due on the principal money due under the mortgage; and (5) the residue is to be paid to the person who, if there were no receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property (subsect. 8).

Such are the covenants implied and powers given to mortgagees in mortgages by deed made since the commencement of the 44 & 45 Vict. c. 41 (1st January, 1882).

The following is the form of a statutory mortgage given by the Conveyancing Act, 1881, in sched. 3, pt. 1 :

THIS INDENTURE made by way of statutory mortgage the day of
1882 between A. of [&c.] of the one part and M. of [&c.] of the other
part WITNESSETH that in consideration of the sum of l. now paid to A. by M.
of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial
owner hereby conveys to M. All that [&c.] To hold to and to the use of M. in fee
simple for securing payment on the day of 1883 of the principal
sum of l. as the mortgage money with interest thereon at the rate of [*four*]
per centum per annum.

In witness, &c.

*** * Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.**

It will be remembered that in a deed expressed to be made by way of statutory mortgage, a covenant for payment of principal and interest and a proviso for redemption are implied by the Act (see *ante*, p. 193). Covenants for title are also implied by stating the character in which the person conveys (*ante*, p. 194). And in all mortgages by deed the powers set out in the foregoing pages are supplied, being powers for a mortgagor or mortgagee when in possession to lease; for a mortgagee to

sell and insure against fire, to appoint a receiver, and if in possession, to cut timber, and to give receipts for the proceeds of the sale, &c., with trusts thereof, if a contrary intention is not therein expressed.

If the statutory mortgage be not used, a mortgage of freehold property will consist of :—

(1) The date, and parties.

(2) The recitals (if any).

(3) The first testatum, setting forth the amount advanced by the mortgagee, and the receipt thereof by the mortgagor; the covenant by the mortgagor with the mortgagee for repayment on a given day of the amount advanced, with interest thereon at a given rate.

(4) The second testatum, whereby the mortgagor as beneficial owner conveys to the mortgagee all the premises.

(5) The habendum unto and to the use of the mortgagee, his heirs and assigns (or in fee simple), subject to the proviso for redemption.

(6) If the property consists of houses or buildings, a covenant by the mortgagee to insure against fire. We shall, however, refer to this point subsequently.

As to negating the powers of leasing given by the Act, see *ante*, p. 196.

The following are the forms of (1) a mortgage deed (not statutory), and (2) of further charge of freeholds given by the Conveyancing Act, 1881, Sched. 4. They are examples of brevity :—

I.—Mortgage.

THIS INDENTURE OF MORTGAGE made the day of 1882 between A. of [&c.] of the one part and B. of [&c.] and C. of [&c.] of the other part WITNESSETH that in consideration of the sum of l. paid to A. by B. and C. out of money belonging to them on a joint account of which sum A. hereby acknowledges the receipt A. hereby covenants with B. and C. to pay to them on the day of 1882 the sum of l. with interest thereon in the meantime at the rate of [four] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to B. and C. interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration A. as beneficial owner hereby conveys to B. and C. All that [&c.] To hold to and to the use of B. and C. in fee simple subject to the proviso for redemption following (namely) that if A. or any person claiming under him shall on the day of 1882 pay to B. and C. the sum of l. and interest thereon at the rate aforesaid then B. and C. or the persons claiming under them will at the request and cost of A. or the persons claiming under him reconvey the premises to A. or the persons claiming under him AND A. hereby covenants with B. [and C.] as follows [*here add covenant as to fire insurance or other special covenants required*].

In witness, &c.

II.—Further Charge.

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of l. and interest at [four] per centum per annum on property at [&c.] WITNESSETH that in consideration of the further sum of l. paid to A. by B. and C. out of money belonging to them on a joint account [*add*

receipt and covenant as in the foregoing mortgage] and further that all the property comprised in the beforementioned indenture of mortgage shall stand charged with the payment to B. and C. of the sum of l. and the interest thereon hereinbefore covenanted to be paid as well as the sum of l. and interest secured by the same indenture.

In witness, &c.

Supplementary Clauses.

In certain special cases, however, the powers and forms given by the Conveyancing Act, 1881, may require to be added to or varied by express clauses in the mortgage deed.

Sale.—Thus, where the mortgaged property consists of business premises, or of an equity of redemption, it may be desirable, and it does not seem where there is no fiduciary relationship between the mortgagee and mortgagor, improper to have an express power of sale to arise on default by the mortgagor, without the necessity of giving him the usual notice.(a) However, where a mortgage was made of a reversionary interest by an expectant at a high rate of interest, with power to sell without notice to the mortgagor, it was held to be oppressive.(b) And it was held to be improper in the case of a solicitor who took a mortgage from his client, to omit the stipulation for notice, without fully explaining to him the stringent nature of the power.(c)

Where an express power of sale is inserted in the mortgage deed, it should be either absolutely complete in itself, or it should expressly declare that the Conveyancing Act, 1881, shall apply so far as not varied by the power of sale contained in the mortgage deed. For instance, a power of sale (apart from the power given by the Conveyancing Act, 1881) conferred by a mortgage deed upon a mortgagee, but not expressed to be also conferred upon his assigns, cannot be exercised by an assignee of the mortgagee.(d)

Insurance.—It will be advisable where the mortgaged property consists either wholly or in part of buildings, to have inserted in the mortgage deed an express covenant by the mortgagor to insure the property against loss by fire; for it will be seen no covenant to insure is implied by the Conveyancing Act, 1881, s. 19, sub-s. 1 (ii.), s. 23, sub-s. 2 (ii.), but only a power for the mortgagee to insure as from the date of the mortgage deed in case the mortgagor neglects to do so.(e)

Where such a covenant is inserted in the mortgage deed, it should contain a provision that the mortgagor shall produce the policy, and the annual receipts of payment of the premiums on demand, and a proviso

(a) *Cockburn v. Edwards*, 18 Ch. Div. 449; 51 L. J. 46, Ch.; 45 L. T. Rep. N. S. 500; Fisher, Mortg. 464, 4th edit.

(b) *Miller v. Cook*, L. R. 10 Eq. 641, 647; 40 L. J. 11, Ch.

(c) *Cockburn v. Edwards*, sup.; *Craddock v. Rogers*, 51 L. T. Rep. N. S. 191; 53 L. J. 968, Ch.

(d) *Bradford v. Belfield*, 2 Sim. 264; *Re Rumney and Smith*, 66 L. J. 641, Ch.; 76 L. T. Rep. N. S. 800; (1897) 2 Ch. 851, C. A.

(e) See *ante*, pp. 197, 203.

that the money received under the policy shall be applied in discharge of the mortgage debt.

Repairs.—As no provision is made by the Conveyancing Act, 1881, as to repairs save when a receiver is appointed (sect. 24, sub-sect. 8, iii.), if the mortgaged property consists of buildings, and it is desired to provide for their being kept in proper repair, an express clause should be inserted in the mortgage deed.

Leases.—As to the power to lease see *ante*, p. 194.

Distress and Attornment.—And where the property mortgaged is in the actual possession of the mortgagor provision can be made by the deed enabling the mortgagee to obtain his interest out of the rents and profits of the property in case the mortgagor should make default in payment. This may be effected either by inserting in the mortgage deed a power for the mortgagee to distrain on the premises for any interest in arrear, or by inserting a clause in the deed making the mortgagor attorn tenant to the mortgagee at a rent, usually the same in amount and payable on the same half yearly days as the interest, with a proviso enabling the mortgagee to enter without notice and determine the tenancy.(a)

Each of these modes has its advantages and disadvantages in respect to the other. Where a power of distress is given, no tenancy is created thereby, even though the mortgagee is empowered to distrain as for rent reserved by lease.(b) It takes effect as a license, and only the goods of the mortgagor, and not those of a stranger on the property, can be distrained.(c) And as such would require registration under the Bills of Sale Act, 1878, s. 4.(d)

By an attornment clause in the mortgage deed the relation of landlord and tenant is created for the purpose of giving to the former a remedy by distress, and the goods of a stranger, if on the premises, may be distrained.(e) And advantage may be taken of Ord. III., r. 6, of R. S. C., as shown *post*.

If it is intended to insert an attornment clause it should be so framed as to create a tenancy from year to year, rather than as a tenancy at will; but the clause must be so worded that it will not deprive the mortgagee of his right of entry without notice to the mortgagor; for under a tenancy from year to year, such a right must be reserved by express words, which are added after the attornment.(f) And if the mortgagor is in possession the mortgagee need not execute the mortgage deed to create the relationship of landlord and tenant between them.(g)

(a) 2 David. Conv. 642, 876, pt. 2, 3rd edit.; p. 94, 4th edit.

(b) *Doe v. Goodier*, 10 Q. B. 957; 16 L. J. 435, Q. B.

(c) *Freeman v. Edwards*, 17 L. J. 264, Exch.; *Kearsley v. Phillips*, *infra*.

(d) *Stevens v. Marston*, 60 L. J. 192, Q. B.; 64 L. T. Rep. N. S. 274.

(e) *Kearsley v. Phillips*, 11 Q. B. Div. 621; 52 L. J. 581, Q. B.; 49 L. T. Rep. N. S. 435; 31 W. R. 909, C. A.

(f) 2 David. Conv. 94, 95, pt. 2, 4th edit.; *Re Threlfall*, 16 Ch. Div. 274.

(g) *Morton v. Woods*, L. R. 4, Q. B. 293; 38 L. J. 81, Q. B.

The proceeds of the distress after satisfaction of the interest in arrear may be applied in payment of the principal, in the absence of any provision to the contrary.(a)

However, as to an attornment clause, the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), enacts that every attornment, instrument or agreement (not being a mining lease) whereby a power of distress is given or agreed to be given as security for a debt or advance, and whereby any rent is reserved as a mode of providing for payment of interest, is to be *deemed* to be a bill of sale of any personal chattels which may be seized thereunder. But it is provided that the section is not to extend to any mortgage of an estate or interest in land, &c., which the mortgagee, being in possession, has demised to the mortgagor as his tenant at a fair and reasonable rent (sect. 6). And sect. 9 of the Bills of Sale Act, 1882, renders void a bill of sale given as security for money which is not according to the form in the schedule to the Act.

Sect. 6 of the Act of 1878 is aimed against a power of distress to secure not a real rent, but the interest on a mortgage debt. It has accordingly been held that to bring a case within the proviso it is necessary that the mortgagee should first take possession of the mortgaged premises, and should then demise them to the mortgagor. A mere constructive possession by force of the attornment clause not being sufficient.(b) Therefore an attornment clause in a mortgage deed giving the mortgagee a power of distress, and not coming within the proviso of section 6 of the Act of 1878, should be registered as a bill of sale, or it is void; but as the deed is only "to be *deemed* to be a bill of sale," it need not be in the form given by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 9.(c)

However, as the Bills of Sale Acts aim at personal chattels, sect. 6 of the Bills of Sale Act, 1878, and sect. 9 of the Act, 1882, do not render void the ordinary attornment clause in a mortgage of realty so as to destroy the relation of landlord and tenant created by it between mortgagee and mortgagor so long as there has been no seizure of personal chattels under it.(d)

Therefore, where there is an attornment clause in a mortgage deed, the mortgagee, after notice to quit given and term ended, may sue on a specially indorsed writ under Ord. III., r. 6, of R. S. C., 1883, for possession.(e)

And although the attornment clause is not such a taking possession by a mortgagee as to bring a case within the proviso of sect. 6 of the Bills of Sale Act, 1878, it would yet, it seems, render the mortgagee

(a) *Ex parte Harrison*, 18 Ch. Div. 127; 50 L. J. 382, Bky.

(b) *Re Willis*; *Ex parte Kennedy*, 21 Q. B. Div. 384; 57 L. J. 634, Q. B.; 59 L. T. Rep. N. S. 749, C. A.; *Green v. Marsh* (1892), 2 Q. B. 330; 61 L. J. 442, Q. B.; 66 L. T. Rep. N. S. 480; 40 W. R. 449, C. A.

(c) *Green v. Marsh*, sup.

(d) *Mumford v. Collier*, 25 Q. B. Div. 279; 59 L. J. 552, Q. B.; 38 W. R. 716.

(e) *Daubus v. Lavington*, 13 Q. B. Div. 347; 53 L. J. 283, Q. B.; 51 L. T. Rep. N. S. 206; 32 W. R. 772; *Hall v. Comfort*, 18 Q. B. Div. 11; 55 L. T. Rep. N. S. 550; 35 W. R. 48.

liable to account at the suit of a subsequent mortgagee for all the rent agreed to be paid by the mortgagor which might be unreceived owing to the mortgagee's wilful default.(a)

Joint Account Clause.

It was, prior to the Conveyancing Act, 1881, the practice when money was advanced by way of mortgage by trustees, to insert a clause in the mortgage deed that the money was advanced by them on a joint account, not as trustees, but by name (so as to keep the trust from the title), and that the receipt of the survivor should be a sufficient discharge for the mortgage money. The trust was shown by a separate deed.(b) For where a mortgage is made to two or more, and on the face of the deed they appear to be owners and not trustees of the money advanced, equity would raise the presumption that the money was advanced in equal shares, and on the death of one of the trustees the survivor could not have given a discharge for the mortgage money.(c)

The 44 & 45 Vict. c. 41, however, enacts that where in a mortgage, money obligation, or transfer thereof, the money advanced or owing is expressed to be advanced by or owing to more persons than one, as money belonging to them on a joint account; or where a mortgage, money obligation, or transfer is made to more persons than one jointly, and not in shares, the money due to them thereon is to be deemed to be and remain money belonging to them on a joint account as between them and the mortgagor or obligor; and the receipt in writing of the survivors or survivor of them, or of the personal representatives of the last survivor, is to be a complete discharge for the money due, notwithstanding notice to the payer of a severance of the joint account (sect. 61, sub-sect. 1).

This section only applies to a mortgage, obligation, or transfer, made after the commencement of the Act, and only if and as far as a contrary intention is not expressed therein, &c. (sub-sects. 2, 3).

Since the commencement of this Act the fact that the money advanced is trust money is still kept from the title, but the joint account clause and power for the survivor to give a receipt for the money will no longer be necessary. The section applies either whether the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares; still, although the joint account is not necessary, it is convenient as a direct statement of the rights of the mortgagees.(d)

Completion of the Mortgage.

The draft deed having been sent to the mortgagor's solicitor for approval, he peruses and eventually approves of it, and makes a fair copy,

(a) *Green v. Marsh*, sup.; but see *Stanley v. Grundy*, 22 Ch. Div. 478; 52 L. J. 248, Ch.; 31 W. R. 315.

(b) *Lewin, Trusts*, 367, 9th edit.; *Coots Mort.* 332, 5th edit.

(c) *Coots*, sup.; see also *Re Blaiberg and Abraham's Contract*, 81 L. T. Rep. N. S. 75; (1899) 2 Ch. 340.

(d) See *Wolst. & T. Conv.* 109, 5th edit.; *Hood & Challis Conv.* 144, 5th edit.

and returns the original draft to the mortgagee's solicitor, who has it engrossed. The engrossment and draft deed are then forwarded by the mortgagee's solicitor to the solicitor for the mortgagor for examination and comparison. The practice being as on a sale.(a)

Searches for incumbrances should now be made by the mortgagee's solicitor as on a sale.(b)

An appointment to complete the matter is then arranged. At the time appointed the mortgagor attends and executes the mortgage deed, and if he is married and it has been necessary to make his wife a party in order to bar her dower, she must execute the deed and acknowledge it, as previously directed on a sale. The mortgage money is then handed to the mortgagor and the title deeds and mortgage deed are given up to the mortgagee.

It is usual to deduct the amount of the charges of the mortgagee's solicitor from the mortgage money, as the mortgagor pays all ordinary costs incurred in respect of the mortgage.(c) This includes a fair copy of the mortgage deed, which, however, must be delivered up to the mortgagor when the debt is paid off.(d) But the mortgagor is not bound to pay costs which are not ordinarily incident to a mortgage.(e)

If the property mortgaged lies in one of the register counties the deed should be registered as on a sale. The instrument may also require registration under the Bills of Sale Acts.(f)

Mortgage of a Life Estate in Freeholds.

A mortgage of a life estate in freeholds, not for the purposes of the Settled Land Acts, by the tenant for life was formerly effected not by assignment of the whole life estate, but by way of demise only for a term of ninety-nine years if the tenant for life should so long live. The reason for this being that a tenant for life has, or at all events had, prior to the Settled Land Act of 1882, given him by the settlement powers of leasing, consenting to sales, &c., annexed to his life estate (g), and to avoid the destruction of the powers by alienation of his estate, it was the practice to make the mortgage in the above mode.(h) But it seems this is not now necessary, as the powers remain notwithstanding the assignment (i); and the position is much the same under the Settled Land Act, 1882, s. 50.(k)

(a) See *ante*, p. 156.

(b) See *ante*, pp. 162, 170, 171.

(c) See 3 Byth. & Jarm. Conv. 888, 4th edit.

(d) *Re Wade and Thomas*, 17 Ch. Div. 348; 50 L. J. 601, Ch.; 44 L. T. Rep. N. S. 599; 29 W. R. 625.

(e) *Re Sparks*, 6 Ch. Div. 361; 37 L. T. Rep. N. S. 301; 25 W. R. 869; *Re Wade and Thomas*, *sup.*

(f) See *ante*, pp. 157, 159; *et post*, p. 207, *et tit.* "Bills of Sale."

(g) See *post*, *tit.* "Settlements."

(h) See 2 David. Conv. 510, 513, pt. 2, 4th edit.

(i) *Re Beddingfield and Herring* (1893), 2 Ch. 332; 62 L. J. 430, Ch.; 68 L. T. Rep. N. S. 634; 41 W. R. 413.

(k) 2 Key & E. Conv. 98, 5th edit.

However, the form of mortgage by demise is still used by some conveyancers (*a*), others now draw the mortgage by way of assignment of the whole life estate; adding a proviso that the powers given by the settlement or the Settled Land Acts shall be exercisable without the consent of the mortgagee. (*b*)

Mortgage of Copyholds.

A mortgage of copyhold property is effected by surrender thereof, subject to a condition that on payment by the mortgagor to the mortgagee of the money lent, with interest thereon, at the rate stipulated, on a given day, the surrender is to become void. And unless the mortgagee wishes to enforce his security he seldom gets admitted as tenant of the mortgaged property, as by this means the fine due to the lord of the manor on admittance is avoided until there is an actual necessity for it. (*c*) It is usual in practice to prepare a deed of covenants to precede or follow the conditional surrender. If made before the surrender, the deed recites the agreement for the loan, then comes a covenant by the mortgagor for payment of the principal money and interest; next a covenant by him as beneficial owner to make the conditional surrender of the property to the use of the mortgagee according to the custom of the manor, with an express power of sale or an express charge on the property, in default of payment. Covenants to insure the buildings against fire and to repair may be added where necessary. (*d*)

The conditional surrender follows.

By the interpretation clause of 44 & 45 Vict. c. 41, s. 2, v., "conveyance," unless a contrary intention appears, includes (*inter alia*) a covenant to surrender, made by deed, on a sale or mortgage of any property; therefore if a person, as beneficial owner, covenants to surrender, covenants for title will be implied. But as the powers of sale given to mortgagees by sects. 19 to 22 of the Act only apply when the mortgage is by deed, they cannot be implied in a conditional surrender. And it seems doubtful whether a covenant to surrender will confer on a mortgagee such implied powers, unless it contains an express charge on the property, for the term "mortgage" includes a charge by sect. 2, sub-sect. vi. (*e*)

The mortgagee should not pay his money until both the deed and the surrender are completed; the latter by entry on the Court Rolls; until the mortgagee is admitted the mortgagor remains tenant to the lord. (*f*)

(*a*) 1 Prid. Conv. 554, 16th edit.; David. Conc. Pr. 239, 16th edit.

(*b*) 2 Key & E., *sup.*

(*c*) Will. Real. Pro. 431, 432, 18th edit.; 2 David. Conv. 663, pt. 2, 3rd edit.

(*d*) See a form 3 Byth. & Jarm. Conv. 1008, 4th edit.; David. Conc. Pr. 213, 16th edit.

(*e*) See 3 Byth. & Jarm. Conv. 762, n. 1009, n. 4th edit.; Wolst. & B. Conv. 42, 74, 8th edit.; Wolst. Forms, 52, 5th edit.; David. Conc. Pr. 214, 16th edit.

(*f*) 3 Byth. & Jarm. Conv., *sup.*; 2 David. Conv. 114, pt. 2, 4th edit.

Mortgage of Leaseholds.

A mortgage of leaseholds for years is effected either by an assignment of the whole of the remaining portion of the original term to the mortgagee, or by way of an underlease thereof to him; the latter course is usually adopted in practice, as by this means the mortgagee is protected against the liability to pay the rent reserved by the original lease, and perform the covenants contained in it running with the land, to which, in the character of assignee of the term, he would be liable.^(a) However, if the rent reserved in the original lease be a merely nominal or trifling one, and the covenants contained therein be not burdensome, or are beneficial to the tenant, as a covenant for renewal on advantageous terms, an assignment of the term would not be objectionable, as it facilitates a sale of the property, and precludes the mortgagor from forfeiting the nominal reversion left in him by an underlease.^(b)

A mortgage of leasehold property may be made by way of statutory mortgage, as stated *ante*, pp. 193, 204. But if such form be not adopted, a mortgage deed by way of underlease would, after the date and parties, recite the original lease setting out the parcels as contained therein, and briefly any mesne assignments there may have been, and also the agreement for the loan. Then come the covenant to pay principal and interest; the demise by the mortgagor, as beneficial owner, of the premises comprised in the original lease, to the mortgagee, to hold to him for all the residue of the term, except some small reversion, usually the last day; and a declaration of trust of the residue of the term for the benefit of the mortgagee; and a proviso for redemption. Covenants for title are implied by the demise as beneficial owner. And powers of sale arise under the Conveyancing Act, 1881.^(c) But covenants to insure the premises against fire and to repair may be added, as also any other clause that may be thought advisable, as a power of attorney for the mortgagee to assign the residue of the term, and to appoint a new trustee thereof.

If the mortgage is by way of assignment, the whole term is assigned to the mortgagee, and of course there can be no declaration of trust of the residue.

Should the original lease contain a covenant or proviso against assigning or underletting without the licence or consent of the lessor, his consent must be obtained before a valid mortgage can be made.^(d) If the consent is obtained, the fact should be briefly recited in the mortgage deed, and the licence itself delivered to the mortgagee on completion of the mortgage.

If the lease is determinable on lives, a policy of life assurance upon

(a) Coote, *Mortg.* 264, 5th edit.; 3 Byth. & Jarm. *Conv.* 764, 4th edit.; *Bonner v. Tottenham, &c., Building Society* (1899), 1 Q. B. 161; 68 L. J. 114, Q. B.; 79 L. T. Rep. N. S. 611, C. A.

(b) 2 David. *Conv.* 118, pt. 2, 4th edit.

(c) See a form David. *Conc. Pr.* 215, 16th edit.; 1 Prid. *Conv.* 526, 16th edit.; 3 Byth. & Jar. *Conv.* 1015, 4th edit.; 2 Key & Elph. *Conv.* 76, 5th edit.

(d) See hereon *post*, tit. "Leases."

one, at least, of the lives should be effected, and assigned by way of collateral security to the mortgagee. The deed, after the date and parties, would recite the title of the mortgagor in the property, the policy of assurance, and the agreement for the loan. The first testatum would, in consideration of the advance, contain the covenant for payment of principal and interest; the second testatum would grant or demise the mortgagor's interest in the property as beneficial owner, to hold unto the mortgagee, subject to the proviso for redemption; and by the third testatum the mortgagor, as beneficial owner, would assign the policy to the mortgagee, to hold subject to the proviso for redemption. The proviso for redemption follows; also a covenant to keep up the policy; &c., as stated *post*, and to insure the buildings, and any other covenant that special circumstances may require.(a) Notice of the assignment of the policy must be given to the insurance office, as already shown.

If the original lease contains a covenant or proviso for renewal, the mortgagor should by the mortgage deed covenant to effect such renewal, and in case of default that the mortgagee may do so and charge the fine payable thereon, if one, and all other incidental expenses, together with interest on the total amount expended by way of further charge upon the mortgaged premises, with a further covenant by the mortgagor to repay to the mortgagee all such sums as the latter shall so expend, with interest thereon at the same rate as that reserved upon the mortgage. However, a mortgagee is entitled to a lien on the estate for the expenses of renewing a renewable leasehold, with interest thereon from the time the sum was advanced, without express stipulation.(b)

Mortgage of a Policy of Life Assurance.

A policy of life assurance is mortgaged by way of assignment. A form is given by the 30 & 31 Vict. c. 144. If this form be not used the deed, after the date and parties, recites that the mortgagor is entitled to a policy of life assurance effected in his own name and on his own life,(c) in a certain office, to a certain amount; and the agreement for the advance thereon. The recitals may, however, be omitted if thought desirable. The covenant for payment of principal and interest follows. The policy is then assigned by the mortgagor as beneficial owner to the mortgagee, to hold subject to the proviso for redemption. The proviso for redemption follows. And the mortgagor covenants not to do any act to vitiate the policy, and to pay the premiums thereon, and in default that the mortgagee may do so, and add the amount so expended to the mortgage debt.(d) The powers of sale given by the 44 & 45 Vict. c. 41, apply. Covenants for title will be implied by the mortgagor conveying as beneficial owner; and trusts for the application of the money received under the

(a) See a form, *Prid. Conv.*, vol. 1; *Key & El. Conv.*, vol. 2; *Wolst. Forms*.

(b) See *Coote, Mortg.* 267, 5th edit.; *Robbins Mortg.* 164.

(c) If the policy be effected on the life of the mortgagee the form must be varied accordingly.

(d) 2 *David. Conv.* 492, pt. 2, 4th edit.; 2 *Key & E. Conv.* 39, 96, 5th edit.

policy and the power for the mortgagor to give receipts may be omitted, the provisions of sect. 22 of the Act being sufficient.

As to making enquiries with respect to any prior incumbrances, and perfecting the transaction by notice see *ante*, pp. 188, 189.

Mortgages under the Land Transfer Acts.

As to mortgages and charges on land registered under the Land Transfer Acts, see *post*, tit. "Land Transfer Acts and Rules."

Mortgages Under Powers—Executors.

Trustees can only mortgage the trust estate under a power arising under some trust instrument, or under the provisions of some statute. Where a mortgage is made under the authority of a power given by deed or will, it should be seen that the terms of the power are, in all points, complied with. (a) We have already (b) stated in what cases a power given to trustees to sell real estate will authorise a mortgage of such estate, and when it will not do so; also whether a power to mortgage will authorise them to give the mortgagee a power of sale. It has also been shown in what cases trustees and executors have a statutory power of mortgaging the trust estate conferred upon them (c); also what right an executor has of mortgaging his testator's assets, including chattels real (d); and the power over real estate of a real representative in case of a person dying after the commencement of the Land Transfer Act, 1897.

A covenant to pay by trustees in a mortgage deed is unusual (e), indeed, their liability to do so is usually negatived in the deed (f), yet a mortgagee cannot by contract with a trustee or executor, on failure of the particular security, acquire a right against the trust estate or assets generally, although the trustee or executor has power to give a charge upon specific assets. (g)

By the Trustee Act, 1893, s. 19, a trustee of renewable leaseholds for lives or years, unless forbidden by the trust instrument, may, if he thinks fit, and must if required by any beneficiary thereof, use his best endeavours to renew the same on the accustomed and reasonable terms, and for that purpose may make or concur in making a surrender of the subsisting lease, &c.; but where by the terms of the settlement or will the tenant for life, &c., in possession is not bound to renew or to contribute to the expenses of renewal, his written consent is necessary to the renewal (subsects. 1, 3). And if money is required to pay for the renewal and the trustee has not the money in hand, he may raise the same by mortgage of the hereditaments to be comprised in the renewed lease, or of any other

(a) See *ante*, pp. 25, 27.

(b) *Ante*, p. 28.

(c) *Ante*, p. 25.

(d) *Ante*, pp. 28, 31.

(e) Coote, *Mortg.* 315, 5th edit.

(f) 2 David. Conv. 634, pt. 2, 3rd edit.; 1 Prid. Conv. 587, 16th edit.

(g) *Farhall v. Farhall*, 7 Ch. App. 123; 41 L. J. 146, Ch.; 20 W. R. 157.

hereditaments subject to the uses or trusts to which those hereditaments are subject; and the mortgagee is not bound to see that the money is wanted for the purpose (sub-sect. 2). This section applies to trusts created either before or after the Act (sub-sect. 3).

The fines and expenses of renewal, where renewed by trustees, are distributable among the beneficiaries of the property according to their enjoyment, to be ascertained by actuarial valuation.(a)

Mortgages to Building Societies.

Mortgages to building societies are a common form of security. The society may be either terminal, that is, one which by its rules is to terminate at a fixed date, or when a result specified in its rules is attained; or it may be permanent (37 & 38 Vict. c. 42, s. 5).

In case of a society incorporated under the Building Societies Act of 1874 (37 & 38 Vict. c. 42), mortgages should be made to it in its corporate name, but if the property be copyhold the lord of the manor may admit not more than three persons as trustees on behalf of the society on payment of the usual fines, &c., payable on the admission of a single tenant, or may admit the society as tenant on payment of a special fine (see sects. 13, 25, 28).

Any society under the above Act may invest its funds on mortgage of real or leasehold securities, &c. (sects. 13, 25); but any land to which the society becomes absolutely entitled by foreclosure, surrender, or other extinguishment of the right of redemption, must as soon afterwards as may be conveniently practicable be sold or converted into money (sect. 13).

By 57 & 58 Vict. c. 47, the powers of investment under sect. 25 of the Building Societies Act, 1874, are to include power to invest in or upon any security in which trustees are for the time being authorised by law to invest (sect. 17). And by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, trustees may, unless expressly forbidden, invest on real or heritable securities in Great Britain or Ireland. By 57 & 58 Vict. c. 47, s. 13, a building society is prohibited from advancing money on a second mortgage unless the prior mortgage is in favour of the society making the advance.

The mortgage deed must for the most part conform in each case to the rules of the particular society as regards the terms upon which the security is to be redeemable as well as in other respects. The covenant for payment of the amount advanced by the society to the mortgagee will, therefore, be for payment of the instalments or subscriptions, &c., according to the rules of the society making the advance, and the proviso for redemption and trusts of the proceeds of sale will in like manner be according to the rules.(b) In the case of a society under the

(a) *Re Baring* (1893), 1 Ch. 61; 62 L. J. 50, Ch.; 67 L. T. Rep. N. S. 702; 41 W. R. 87.

(b) See 2 David. Conv. 1239, n. pt. 2, 3rd edit.; p. 706, 4th edit.; 2 Key & E. Conv. 120, 5th edit.; David. Conc. Pr. 269, 16th edit.

Act of 1874, there is no exemption of mortgages from stamp duty (sect. 41).*(a)*

By 37 & 38 Vict. c. 42, s. 42, when all moneys intended to be secured by the mortgage have been paid or discharged, the society may (1) endorse upon or annex to such mortgage a reconveyance of the mortgaged property to the owner of the equity of redemption, or to such person, &c., as he may direct, or (2) a receipt under the seal of the society, countersigned by the secretary or manager (in the form given in the Schedule to the Act), which vacates the mortgage and vests the estate of and in the property in the person for the time being entitled to the equity of redemption, without any reconveyance or surrender. If the mortgage has been registered under any Act, &c., the above receipt verified by the oath of any person, should be entered on the register, and the registrar gives a certificate thereof (sect. 42). The statutory form of receipt is exempt from stamp duty (sect. 41).*(b)*

It has been held that the effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society. Thus, where there are successive equitable mortgages, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time. But if the society is paid off by an equitable mortgagee without notice of any prior incumbrances, the legal estate vests in him although there are incumbrances prior to his in point of time.*(c)*

It would seem that a building society may transfer a mortgage made to it, but the point cannot be said to be settled.*(d)*

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), every registered proprietor of land may charge it in favour of a building society under the Building Societies Acts, by a mortgage made in pursuance of the rules of the society, and the mortgage is to be deemed a charge, and is to be registered accordingly (sect. 9, sub-sect. 3).

Of the Rights and Priorities of Mortgagees, inter se, and of Tacking.

It not unfrequently happens that the same property is made the subject of several distinct mortgages to different mortgagees; and in such events questions as to priorities frequently arise. In determining which

(a) As to societies under 6 & 7 Will. 4, c. 32, the exemption from stamp duty is taken away by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 89, save as to mortgages by members not exceeding 500*l*.

(b) See also as to stamp duty, *Old Battersea Building Society v. Inland Revenue*, 67 L. J. 696, Q. B.; 78 L. T. Rep. N. S. 746; (1898) 2 Q. B. 294.

(c) *Fourth City Benefit Building Society v. Williams*, 14 Ch. Div. 140; 49 L. J. 245, Ch.; 28 W. R. 572.

(d) See *Ulster Permanent Building Society v. Glenton*, 21 Ir. L. Rep. 124; *Re Rumney and Smith* (1897), 2 Ch. 351; 66 L. J. 641, Ch.; 76 L. T. Rep. N. S. 800; 45 W. R. 678, C. A.

two rules or maxims of equity are applied; the first maxim is that where the equities are equal the law prevails^(a); and the second is that as between persons having only equitable interests, if their equities in other respects are equal, *qui prior est tempore potior est jure*.^(b) These maxims or rules are, however, subject to qualifications.

As a rule, a mortgagee having the legal estate is, under the first of the above maxims, entitled to priority. But no incumbrancer with notice of a prior incumbrance at the time when he advanced his money can obtain priority by holding or acquiring the legal estate.^(c) We have, however, already ^(d) dealt with the doctrine of notice.

Cases have frequently occurred in which it has been sought to postpone a legal mortgagee on the ground of his not obtaining possession of the title deeds of the mortgaged property to a subsequent mortgagee. And in a recent case it was held that the court will postpone a legal mortgagee to a subsequent equitable mortgagee: (1) Where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable mortgage, of which assistance or connivance the omission to use ordinary care in enquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot be explained; or (2) where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising it has by the misconduct of the agent been represented as the first estate. But the Court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee.^(e)

Nor will the Court do so where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery^(f). But it is otherwise if he completes the mortgage without making any inquiry after the deeds.^(g)

Where a packet of deeds was given to the mortgagee, representing that it contained all the deeds relating to the property, whereas it contained some only, it was held that he had not lost his priority although he had not examined the packet.^(h) But where A., a second mortgagee with power of sale, was induced by his solicitor to execute a deed which was in fact a conveyance of the property to the solicitor, with a receipt for

(a) Story's Eq. s. 64, c.

(b) *Shropshire Union Railways v. The Queen*, L. R. 7 H. L. Cas. 496; 45 L. J. 30, Q. B.

(c) Robbins, Mortg. 1215, 1299; *Bassett v. Nosworthy*, 2 L. C. Eq. 150, *et seq.*, 7th edit.; *Oliver v. Hinton*, 68 L. J. 583, Ch.; (1899) 2 Ch.; 264, C. A.

(d) *Ante*, pp. 85—89.

(e) *Northern Counties of England Fire Insurance Co. v. Whipp*, 26 Ch. Div. 482; 53 L. J. 629 Ch.; 51 L. T. Rep. N. S. 806; 32 W. R. 626, C. A.

(f) *Agra Bank v. Barry*, L. R. 7 Ho. L. Cas. 135.

(g) *Worthington v. Morgan*, 16 Sim. 547; *Clarke v. Palmer*, 21 Ch. Div. 124; 51 L. J. 634, Ch.; 48 L. T. Rep. N. S. 857.

(h) *Ratcliffe v. Burnard*, 6 Ch. App. 652; 40 L. J. 777, Ch.; 24 L. T. Rep. N. S. 215; 19 W. R. 764.

the purchase money duly indorsed on the deed, though no money was in fact paid, presuming that the deed was a mere form, and the solicitor deposited the deeds with B. to secure a debt, B. was held to have priority over A.(a)

As between parties having only equitable interests, it has already (*ante*, p. 217) been stated that if the equities in other respects are equal the maxim *qui prior est tempore potior est jure* applies. But in order to postpone an equitable mortgagee to another equitable mortgagee, whose security is of later date, it is not necessary, as it would be in order to deprive a legal mortgagee of the advantage of the legal estate, to show that the first equitable mortgagee has been guilty of negligence amounting to, or which is evidence of fraud. Between two equitable mortgagees negligence such as omission to obtain possession of or to make inquiries about the title deeds, thereby enabling the mortgagor to deal with the deeds as if they were his own, and who by depositing them to secure an advance with a subsequent incumbrancer who has no notice of the prior charge, may be sufficient to postpone the prior equitable incumbrancer.(b)

We have shown that notice is essential to give effect to mortgages of choses in action, and of personal property held upon trust (*ante*, pp. 188. 189); but such notice is not requisite to complete a security upon real estate, unless devised upon trust for sale, and the omission to give such notice is not a neglect of duty sufficient to postpone a prior equitable incumbrancer.(c)

Tacking.—The protection afforded by the legal estate is not confined to cases where a mortgagee acquires the legal estate at the time of his making his advance; for if a third mortgagee (save as to lands in Yorkshire), who had no notice of a second mortgage at the time he advanced his money, can purchase the first legal mortgage, he may *tack* or unite his third mortgage to the first and so cut out or postpone the second mortgage.(d) So where a first mortgagee has, without notice of a second mortgage, made a further advance to the mortgagor, he may tack his further advance to his first mortgage, and so cut out or postpone the second mortgage.(e) And it has recently been held that the rule that a first mortgagee must not, at the time of advancing the money, have notice of the second mortgage in order to tack, applies where the prior mortgagee is under a legal obligation to make the further advance, whether such

(a) *Hunter v. Walters*, 7 Ch. App. 75; 41 L. J. 175, Ch.; 25 L. T. Rep. N. S. 765; 20 W. R. 218.

(b) *Farrand v. Yorkshire Banking Company*, 40 Ch. Div. 182; 58 L. J. 238, Ch.; 60 L. T. Rep. N. S. 669; 37 W. R. 318; *Re Castell and Brown* (1898), 1 Ch. 315; 67 L. J. 169, Ch.; 78 L. T. Rep. N. S. 109; 46 W. R. 248.

(c) *Union Bank v. Kent*, 39 Ch. Div. 238; 57 L. J. 1022, Ch., C. A.; *Re Richards*, 45 Ch. Div. 589; 59 L. J. 728, Ch.; 63 L. T. Rep. N. S. 451; 39 W. R. 186; *Hopkins v. Hemsworth* (1898), 2 Ch. 347; 78 L. T. Rep. N. S. 832; 67 L. J. 526, Ch.; *Consolidated Insurance Co. v. Riley*, 1 L. T. Rep. N. S. 209; 1 Giff. 371.

(d) *Marsh v. Lee*, 2 Vent. 339; 1 L. C. Eq. 696, 6th edit.; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; 5 L. T. Rep. N. S. 90; 34 L. J. 468, Ch.

(e) *Hopkinson v. Rolt*, *sup.*

obligation is contained in the mortgage deed or in another deed, the execution of which is part of the consideration for the mortgage.(a) On a mortgage to joint tenants on a joint account (*ante*, p. 209), notice to one of them of a second mortgage is sufficient to displace their right to tack a further advance.(b)

If at the time of making the advance the person making it has no notice, actual or constructive,(c), of the intermediate incumbrance, it is immaterial that he has obtained notice thereof at the time of obtaining the legal estate.(d) But he cannot protect himself by obtaining the legal estate from a trustee if he has before getting it notice of the existence of the trust, for then he himself becomes a trustee.(e)

By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 37), s. 7, tacking was abolished, but by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129, the above section was repealed save as to anything done thereunder during the time of its operation. By the Yorkshire Registry Act (47 & 48 Vict. c. 54), however, as already (*ante*, p. 161) shown, assurances as to lands in the three ridings are to rank in priority according to the date of their registration; and no priority or protection is to be allowed to any estate or interest in lands by tacking it to any legal estate therein, as to lands in the three ridings of Yorkshire (except as against estates or interests existing prior to the Act), even though the party claiming such priority or protection claims as a purchaser for value without notice (sects. 14, 16).

A first legal mortgagee has been permitted to tack a judgment debt to his first mortgage, when he made the further advance on such judgment without notice of an intermediate incumbrance.(f) But it must be remembered that now a judgment does not affect land until it is actually delivered in execution; and the writ of execution must be duly registered.(g)

And a judgment creditor will not be permitted to buy the first legal mortgage and tack his judgment to the first legal mortgage, because he did not originally lend his money on the security of the land.(h)

Tacking is not allowed where the legal estate is outstanding; for in such an event the several mortgagees are as a rule paid according to their priority in point of time, as we have already stated. But if any one of the incumbrancers has a better title than the others to call for a conveyance of the legal estate, equity will consider him as being in the

(a) *West v. Williams*, 68 L. J. 127, Ch.; 79 L. T. Rep. N. S. 575; (1899) 1 Ch. 132, C. A.

(b) *Freeman v. Laing*, 68 L. J. 586, Ch.; (1899) 2 Ch. 355.

(c) As to notice, see *ante*, p. 85.

(d) *Marsh v. Lee*, sup.; *Belchier v. Butler*, 1 Eden, 522.

(e) *Robbins, Mortg.* 1301; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; 43 L. J. 694, Ch.; *Harpham v. Shacklock*, 19 Ch. Div. 207; *Ledbrook v. Passmore*, 57 L. J. 855, Ch.; 59 L. T. Rep. N. S. 306.

(f) *Shepherd v. Titley*, 2 Atk. 348; 1 L. C. Eq. 713, 716, 6th edit.

(g) See 27 & 28 Vict. c. 112; 51 & 52 Vict. c. 51, ss. 5, 6; *et ante*, p. 164 *Robbins, Mortg.* 1230.

(h) 1 L. C. Eq. 709, 6th edit.; *Robbins, Mort.* 1228.

same position as if he had the legal estate (a); as (*ex. gr.*) when he has a declaration of trust of the legal estate (b); or he has possession of the title deeds.(c)

Transfers of Mortgages.

A mortgage is assignable, and the concurrence of the mortgagor in the transfer is not necessary; but it is advisable, where possible, that he should be a party, as thereby he admits the existing amount of the mortgage debt; for an assignee takes, subject to the real state of account between mortgagor and mortgagee, and can only claim what is actually owing.(d) But an assignee is entitled to the whole sum due although he buys at a less price, unless he fills some fiduciary character to the mortgagor, as trustee, agent, or executor,(e) or solicitor.(f) And if the mortgagor concurs, arrears of interest are, as against him, converted into principal.(g)

If the mortgagor does not concur in the transfer, the solicitor for the transferee should inquire of the mortgagor if the whole debt is still due, or if any portion has been paid off. And as soon as the transfer is complete notice of it should be given to the mortgagor, so as to prevent any payments by him to the mortgagee on account of the mortgage debt, as well as to complete the transfer and enable the assignee to sue for the debt in his own name.(h)

Mortgagor a Party not having Incumbered.—The several parts of a deed of transfer, when the mortgagor concurs, if one of the forms given by the Conveyancing Act, 1881 (see *post*), be not adopted, are the date, and parties (being the mortgagee of the first part, the mortgagor of the second part, and the transferee of the third part), and made supplemental to an indenture of mortgage, dated, &c., and made between, &c. (being the original mortgage), then follow a recital that the principal money is still due, but that all interest has been paid, and a recital of the agreement for the transfer. Then comes the first testatum, where, in consideration of the money paid, the transferor, as mortgagee, assigns the mortgage debt and future interest, and the benefit of all powers and securities for payment to the transferee, and the first habendum. Next the second testatum, whereby the transferor as mortgagee conveys, and the mortgagor as beneficial owner conveys and confirms (i) the mortgage

(a) 1 L. C. Eq. 717, 718, 6th edit.; Robbins, *Mortg.* 1217; *Layard v. Maud*, L. R. 4 Eq. 397; *Fourth City Benefit Building Society v. Williams*, 14 Ch. Div. 140; 49 L. J. 245, Ch.; 42 L. T. Rep. N. S. 615; 28 W. R. 572.

(b) 1 L. C. Eq., *sup.*; Robbins, *sup.*

(c) *Layard v. Maud*, *sup.*

(d) *Matthews v. Wallwyn*, 4 Ves. 118; 2 David. Conv. 264, pt. 2, 4th edit.: 3 Byth. & Jarm. Conv. 961, 1198. 4th edit.

(e) *Morret v. Paske*, 2 Atk. 53.

(f) *Macleod v. Jones*, 24 Ch. Div. 289, 300; 49 L. T. Rep. N. S. 321; 53 L. J. 145. Ch.; 32 W. R. 43.

(g) *Ashenhurst v. James*, 3 Atk. 271.

(h) 36 & 37 Vict. c. 66, s. 25, sub-s. 6; and see *Dixon v. Winch*, 68 L. J. 572, Ch.

(i) If the debt be secured on leaseholds for years, the second testatum and habendum will require to be altered to meet the different tenure of the property.

premises to the transferee, to hold the same subject to the subsisting equity of redemption. A new covenant by the mortgagor to pay principal and interest is not necessary since 36 & 37 Vict. c. 66, s. 25, sub-s. 6 (*infra*), unless the equity of redemption has devolved on some other person since the mortgage who joins in the transfer.(a)

Formerly the mortgagee covenanted merely that he had done no act to incumber the property. By the 44 & 45 Vict. c. 41, s. 7, sub-s. 1 (F) it is provided that in a conveyance by a person who conveys and is expressed to convey as mortgagee, a covenant extending to such person's own acts only is implied to the effect that the person so conveying has not executed or done, or knowingly suffered, or been party or privy to any deed or thing, whereby the subject matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby such person is in anywise hindered from so conveying the subject matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

The transfer may, however, if brevity be not desired, be in effect a new mortgage, if the equity of redemption has not been incumbered. The debt is assigned by the mortgagee as mortgagee to the transferee, with all powers, &c., and a new covenant for payment thereof with interest is entered into by the mortgagor with the transferee. Then the mortgaged property is conveyed by the mortgagee as mortgagee, and by the mortgagor as beneficial owner, to the transferee, to hold to him free from the equity of redemption contained in the mortgage deed, but subject to a new proviso for redemption in the deed of transfer.(b)

Mortgagor a Party having Incumbered the Equity of Redemption.—In this case, after the date, parties, and recitals, the mortgage debt is assigned by the mortgagee as mortgagee, with all powers, &c., and the mortgaged property is conveyed by him as mortgagee to the transferee, at the request of the mortgagor, subject to the existing equity of redemption; but the mortgagor does not join in the grant. For no covenants for title are given or implied by him as he has incumbered the equity of redemption; nor are any new powers given, as they could not be exercised to the disadvantage of the subsequent incumbrancers. But it is usual to make the mortgagor enter into a new covenant for payment of principal and interest, with the transferee.(c)

Mortgagor not a Party.—In this case the transfer consists of an assignment by the mortgagee, as mortgagee of the mortgage debt, and interest, with all powers, &c., and a conveyance by him, as mortgagee to the transferee of the mortgaged property, to hold the same subject to the existing equity of redemption.(d)

(a) See 1 Prid. Conv. 640, n. 16th edit., where a brief form of transfer is given.

(b) See 2 David. Conv., pt. 2, p. 266, 4th edit.; and for a form *Id.*, p. 788; 2 Key & E. Conv. 230, 4th edit.; p. 206, 5th edit.; 3 Byth. & Jarm. Conv. 1208, 4th edit.

(c) 2 David. Conv. 265, pt. 2, 4th edit.; David. Conc. Pr. 294, 16th edit.; 2 Key & E. Conv. 230, 4th edit.; p. 209, 5th edit.

(d) 2 Key & E. Conv. 201, 5th edit.; 1 David. Conc. Pr. 290, 16th edit.

Variations in the above forms will be necessary in the case of leaseholds, and on a further charge, &c.

If the mortgagee, without the concurrence of the mortgagor, and without first calling upon him to redeem, and no interest is in arrear, assigns the mortgage he cannot add the costs of the transfer to his mortgage debt.(a)

It was the practice formerly, where the mortgagor was not a party to the transfer, to insert in the deed of transfer a power of attorney to sue for the mortgage debt in the name of the mortgagee, as the debt, being a *chose in action*, was not assignable at law. By the 36 & 37 Vict. c. 66, s. 25, sub-s. 6, it is, however, provided that an absolute assignment in writing (not being by way of charge only) signed by the assignor of a debt or legal *chose in action* shall, subject to all equities formerly entitled to priority over the rights of the assignee, pass and transfer to the assignee the legal right to the debt or *chose in action* and all remedies for the same, and power to give a good discharge for the same, without the concurrence of the assignor, from the time that express notice in writing is given to the debtor or person liable to the assignor.

The assignment of the mortgage debt must be absolute, and not by way of charge only; but it seems to be now settled that a mortgage of a debt due to the mortgagor made in the ordinary form, with a proviso for redemption and re-assignment, is "an absolute assignment (not purporting to be by way of charge only)" within the above section.(b).

It has already been stated that on an advance of trust moneys on mortgage it is usual to draw the mortgage deed so as not to disclose the trust (*ante*, p. 209), so on the appointment of new trustees of the fund, and a transfer thereof from the old to the new trustees, the transfer should assign the mortgage debt and convey the mortgaged lands to the new trustees by name without in any way disclosing the trust.(c) If only one trustee retires, then the 44 & 45 Vict. c. 41, s. 50, provides that freehold land or a thing in action may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person. This had already been enacted as to personal property, including chattels real, by 22 & 23 Vict. c. 35, s. 21.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (as to appointment of new trustees), does not apply to land conveyed by way of mortgage for securing money subject to the trust (sub-sect. 3).

Statutory Transfer.—By the 44 & 45 Vict. c. 41, s. 27, a transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in one of the forms. (A.).

(a) *Re Radcliffe*, 2 Jur. N. S. 379; 22 Beav. 201.

(b) *Tancred v. Delagoa Bay Company*, 23 Q. B. Div. 239; 58 L. J. 459, Q. B.; *Durham, Bros. v. Robertson* (1898), 1 Q. B. 765; 67 L. J. 484, Q. B.; 78 L. T. Rep. N. S. 438, C. A.; disapproving of *National Provincial Bank v. Harle*, 6 Q. B. Div. 626; 44 L. T. Rep. N. S. 585.

(c) 2 David. Conv. 1321 n., pt. 2, 3rd edit.; 2 Key & E. Conv. 217, 5th edit.: David. Conc. Pr. 292, 16th edit.

(B.) and (C). given in part 2 of sched. 3 of the Act, with such variations and additions, if any, as circumstances may require.

In whichever of the forms the deed of transfer is made, it is to have effect as follows :

(1.) There becomes vested in the transferee (which term includes his executors, administrators, and assigns) the right to demand, sue for, recover and give receipts for the mortgage money, or the unpaid part thereof, and the interest due, if any, and to become due, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee.

(2.) All the estate and interest, subject to redemption, of the mortgagee, in the mortgaged land, is to vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in form B. (where a person is expressed to join therein as covenantor), there is also implied a covenant with the transferee, that the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon in the meantime, at the rate stated in the mortgage deed ; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest thereon, at the same rate, on the successive days, by the mortgage deed fixed for payment of interest (sub-sects. 1-3 ; and as to (C.) see further sub-sect. 4).

By sect. 28 of 44 & 45 Vict. c. 41, which has already (*ante*, p. 194) been noticed, it is enacted that in a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part is to be deemed to be a joint and several covenant by them ; and where there are more mortgagees or more transferees than one, the implied covenant with them is to be deemed to be a covenant with them jointly, unless the sum secured is expressed to be secured to them in shares or distinct sums, in which case the implied covenant with them is to be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

The following are the forms of statutory transfers given by the Conveyancing Act, 1881, sched. 3, pt. 2 :

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of
1883 between M. of [&c.] of the one part and T. of [&c.] of the other part
supplemental to an indenture made by way of statutory mortgage dated the
day of 1882 and made between [&c.] WITNESSETH that in consideration
of the sum of l. now paid to M. by T. being the aggregate amount of l.
mortgage money and l. interest due in respect of the said mortgage of which
sum M. hereby acknowledges the receipt M. as mortgagee hereby conveys and
transfers to T. the benefit of the said mortgage.

In witness, &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between A. of [&c.] of the first part B. of [&c.] of the second part and C. of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WITNESSETH that in consideration of the sum of l. now paid to A. by C. being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum A. hereby acknowledges the receipt A. as mortgagee with the concurrence of B. who joins herein as covenantor hereby conveys and transfers to C. the benefit of the said mortgage.

In witness, &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between A. of [&c.] of the first part B. of [&c.] of the second part and C. of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WHEREAS the principal sum of l. only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS B. is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of l. now paid to A. by C. of which sum A. hereby acknowledges the receipt and B. hereby acknowledges the payment and receipt as aforesaid* A. as mortgagee hereby conveys and transfers to C. the benefit of the said mortgage And this indenture also witnesseth that for the same consideration A. as mortgagee and according to his estate and by direction of B. hereby conveys and B. as beneficial owner hereby conveys and confirms to C. All that [&c.] To hold to and to the use of C. in fee simple for securing payment on the day of 1882 of † the sum of l. as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness, &c.

[Or, in case of further advance, after aforesaid at* insert and also in consideration of the further sum of l. now paid by C. to B. of which sum B. hereby acknowledges the receipt and after of at † insert the sums of l. and l. making together]

. Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.

Transfer of Mortgage of Copyholds.—Where copyholds have been mortgaged by conditional surrender in the mode already (*ante*, p. 211) indicated, but the mortgagee has not been admitted, the mode of transfer is for the mortgagor to make a new conditional surrender to the transferee, satisfaction being also entered upon the old surrender. If the mortgagor declines to concur in the transfer, the mortgagee must be admitted tenant on the conditional surrender to him, and he can then surrender to the transferee, subject to the mortgagor's right of redemption. So this plan must be adopted when the vacating of the original surrender and the substitution of a new one to the transferee, would involve the risk of letting in subsequent incumbrances. This plan involves the payment of fines and fees, and may be avoided by the transferee

being satisfied with the mortgagee's covenant to surrender, of which the transferee can compel the fulfilment (a); or he may accept a declaration of trust by the transferor of the benefit of the original surrender.(b)

The conditional surrender must be accompanied by a deed by which the mortgagee, as mortgagee, assigns the mortgage debt and the benefit of the powers, &c., in the mortgage. The deed, where the mortgagor joins, and the mortgagee has not been admitted, would consist of the date, parties, mortgagee of first part, mortgagor of second part, and transferee of third part, made supplemental to the original covenant to surrender. Recitals of the conditional surrender, and that the mortgagee has not been admitted; that the mortgage debt is due, and agreement to transfer. The first testatum, whereby the mortgagee, as mortgagee, assigns the mortgage debt, and the benefit of all powers and securities for the same, and the habendum. The second testatum, where the mortgagor, as beneficial owner, covenants to surrender the mortgaged property to the use of the transferee, subject to redemption. Also an agreement to enter up satisfaction on the first conditional surrender.(c)

Transfer after Death of Mortgagee.—The parties to transfer a mortgage after the death of a mortgagee would be similar to those in a re-conveyance, under the same event, which will be treated of *post*.

Transfer of Charges under the Land Transfer Acts.—The practice hereon is stated *post*, tit. "Land Transfer Acts and Rules."

Of the Rights and Remedies of a Mortgagee.

We have already in previous pages anticipated some of the powers and remedies of a mortgagee arising under his mortgage deed or under some statute. Other remedies of a legal mortgagee remain to be considered.

They embrace the following: After the time for payment of the mortgage debt is passed, the mortgagee may proceed by action (1) to foreclose the equity of redemption, or (2) to eject the mortgagor, and (subject to powers of leasing given by the mortgage deed, if any, or by the Conveyancing Act, 1881), any of the mortgagor's tenants who became such after the mortgage (d), or (3) to recover on the covenant for payment of the principal and interest contained in the mortgage deed, or implied in a statutory mortgage under the above statute, or (4) to sell the mortgaged property under the power of sale contained in the mortgage deed, if any, or conferred upon the mortgagee by the above statute (e), or (5) he may (f) enter into possession of the mortgaged property and pay himself out of the rents and profits thereof.

(a) 2 David. Conv. 1307, n., pt. 2, 3rd edit.; p. 793, n., 4th edit.; 3 Byth & Jarm. Conv. 1203, n., 4th edit.

(b) 1 Prid. Conv. 507, 16th edit.

(c) See form 1 Prid. Conv. 646, 16th edit.; 2 Key & E. Conv. 209, 5th edit.

(d) See *ante*, p. 196.

(e) See *ante*, p. 197.

(f) A mortgagee may enter into possession immediately after the execution of the deed, if there be no proviso for quiet enjoyment by the mortgagee until default, as there seldom is in modern practice (2 David. Conv. 43, 90, pt. 2, 4th edit).

As to the remedies of a registered proprietor of a charge under the Land Transfer Acts see, *post*, tit. "Land Transfer Acts and Rules."

Remedy by Action.—As to the time within which proceedings must be taken, by 37 & 38 Vict. c. 57, s. 8 (as will be more fully shown subsequently), an action to recover money secured by mortgage, judgment, or lien on land must be brought within twelve years next after a present right to receive the same accrued to a person capable of giving a discharge for the same, or within twelve years after part payment of principal or interest, or a written acknowledgment of the right thereto duly given.^(a)

Since the Judicature Acts a mortgagee may combine in an action in the Chancery Division a claim on the covenant for payment of the debt and a claim for foreclosure, and obtain an order for personal payment of the mortgage debt with an order for foreclosure. If the amount of principal and interest is admitted or proved at the trial an order for immediate payment thereof may be made, and for costs to be taxed. But if the amount be not so admitted or proved an account will be directed to be taken of what is due to the mortgagee for principal and interest and taxed costs, coupled with an order for payment of such sum.^(b) The Court may, however, allow time for payment.^(c)

If the mortgage deed contains separate covenants by the mortgagor for payment of the principal sum, and interest at five per cent. per annum so long as the same or any part thereof should remain unpaid, and the mortgagee after default sues on the covenants and recovers judgment thereon, the covenants are thereby merged in the judgment, and the mortgagee is thereafter entitled only to interest on the judgment debt at the rate of four per cent. per annum.^(d) Where a rate of interest exceeding four per cent. is reserved by a mortgage deed it should be expressly stipulated that the same should be paid at the rate reserved, notwithstanding any judgment or order in which the covenant is merged.^(e)

A solicitor having authority from the mortgagee to accept payment of the amount due under a mortgage, has no implied authority to accept tender of a cheque instead of cash, so as to make the tender available against the mortgagee.^(f)

A mortgagee may sue the mortgagor on the covenant for payment contained in the mortgage deed, after the mortgagor has assigned the equity of redemption to another, but this gives him a new right to redeem, and

(a) See further *post*, tit. "Statutes of Limitation."

(b) *Hunter v. Myatt*, 28 Ch. Div. 181; 52 L. T. Rep. N. S. 509; 54 L. J. 615, Ch.; *Farrer v. Lacy and Co.*, 31 Ch. Div. 42; 55 L. J. 147, Ch.; 53 L. T. Rep. N. S. 515; C. A.

(c) *Forest v. Shore*, 32 W. R. 356; *Farrer v. Lacy and Co.*, *sup.*

(d) *Ex parte Fewings, Re Sneyd*, 25 Ch. Div. 338; 53 L. J. 545, Ch.; 50 L. T. Rep. N. S. 109; 32 W. R. 352, C. A.

(e) Per Fry, L. J. in *Ex parte Fewings*, *sup.*, at p. 355; and see 2 Key & E. Conv. 10, 5th edit.

(f) *Blumberg v. Life Interests, &c., Corporation* (1897), 1 Ch. 171; 66 L. J. 127, Ch.; 45 W. R. 246; 75 L. T. Rep. N. S. 627; (1898) 1 Ch. 27; 67 L. J. 118, Ch. 77 L. T. Rep. N. S. 506, C. A.

on payment of principal, interest, and costs he is entitled to a re-conveyance, subject to any equity of redemption vested in any other person.(a)

By 44 & 45 Vict. c. 41, s. 25, sub-s. 1, any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

And by sub-sects. 2 and 4, in any action, whether for foreclosure, redemption, or sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and that the mortgagee or person so interested does not appear in the action, and without allowing any time for redemption, or for payment of the mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, without previously determining the priorities of incumbrancers, and may impose terms, including the deposit in Court of a sum, fixed by the Court, to meet the expenses of sale and secure the performance of the terms imposed.

It seems an equitable mortgagee is entitled under sub-sect. 2 to an order for sale instead of foreclosure.(b)

But if the action is brought by a person interested in the right of redemption and seeking a sale, the Court, on any defendant's application, may direct the plaintiff to give security for costs, and give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants (sub-sect. 3).

The Court has power under sect. 25, sub-sect. 2, in an action of redemption, to make an order for sale of mortgaged property on an interlocutory application by the mortgagor without waiting for the hearing of the action. The sale may be ordered to be made out of Court, but the proceeds of the sale will be directed to be brought into Court.(c)

So the Court has power under this section to order a sale of the mortgaged property after a preliminary foreclosure judgment has been given, but before it has become absolute.(d)

Remedy by Sale, &c.—In addition to the remedies by action, the mortgagee may proceed to exercise the powers conferred upon him by the 44 & 45 Vict. c. 41, ss. 19 to 24, or reserved to him by the mortgage deed, which have already (*ante*, p. 198) been considered.

If the mortgagee exercises his power of sale, and the proceeds thereof do not realise enough to repay him his principal and interest, and the costs and charges incidental thereto, whether he may proceed to sue the

(a) *Kinnaird v. Trollope*, 39 Ch. Div. 636 ; 57 L. J. 905, Ch. ; 59 L. T. Rep. N. S. 433.

(b) *Oldham v. Stringer*, 51 L. T. Rep. N. S. 895 ; 33 W. R. 251.

(c) *Woolley v. Coleman*, 21 Ch. Div. 169 ; 51 L. J. 854, Ch. ; 46 L. T. Rep. N. S. 737.

(d) *Union Bank of London v. Ingram*, 20 Ch. Div. 463 ; 46 L. T. Rep. N. S. 507 ; 51 L. J. 508, Ch. ; 30 W. R. 375.

mortgagor on his covenant for the balance remaining due is not yet authoritatively settled by a direct decision. In the case of *Tooke v. Hartley* (a), which is one of the earliest decisions hereon, this right was conceded. In *Perry v. Barker* (b), however, on a similar state of facts, Lord Erskine granted an injunction to restrain an action brought to recover the amount remaining due after a foreclosure and sale, on the ground that such an action opened the foreclosure.

In *Lockhart v. Hardy* (c) a mortgage debt was secured by a mortgage on real estate, subject to the usual proviso for redemption, and also by a covenant and bond. After foreclosure the mortgagee fairly sold the estate for less than what was due to him. He then wished to claim against the estate of the mortgagor on his bond for the residue of the mortgage debt remaining unsatisfied. But it was held that he could not do so, as so proceeding had the effect of opening the foreclosure; and the mortgagor might pay the whole debt, and in that case would be entitled to have the estate restored to him; and the mortgagee, by the sale, had precluded himself from so restoring it.

The case of *Palmer v. Hendrie* (d) cannot be said to add anything to elucidate the question either one way or the other. Here a mortgagee concurred with the transferee of the equity of redemption in selling the property, and he allowed such transferee to receive the purchase money, and it was held that the mortgagee could not afterwards sue the mortgagor for the debt. The mortgagee had, in fact, constituted the transferee his agent to receive the money.

The case of *Walker v. Jones* (e) only decides that where a mortgagee has, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, he is not entitled to transfer the mortgage without assigning the collateral securities, and thus sever the debt from the security.

The last case decided on the point known to the writer is *Rudge v. Richens* (f), which, although it involves the point under discussion, was really decided on a question of pleading. To a declaration by a mortgagee against the mortgagor for the balance due for principal and interest after sale, under a power of sale in the mortgage deed, the defendant pleaded on equitable grounds that after default in payment of principal and interest the plaintiff, pursuant to the covenants in the deed, entered into and took possession of the mortgaged premises, and sold the same, and so deprived the defendant of his right to have them reconveyed to him on payment of the principal money and interest due. A judge at chambers having struck out the plea on the ground that it was a bad and dishonest plea, the Court refused to interfere, and intimated an opinion that where a sale under a power was *bonâ fide*, a mortgagee was

(a) 2 Bro. C. C. 125, and note.

(b) 13 Ves. 198, 205.

(c) 9 Beav. 349.

(d) 27 Beav. 349; 28 Id. 341.

(e) L. R. 1 P. C. 50; 35 L. J. 30, P. C.; 14 W. R. 484.

(f) L. R. 8 C. P. 358; 42 L. J. 127, C. P.; 28 L. T. Rep. N. S. 537.

entitled to sue on his covenant for any part of the mortgage debt remaining unsatisfied by such sale.

From the foregoing the following conclusions may be drawn: (1) That if a mortgagee, having his debt secured by a charge on land, and also by covenant or bond, forecloses and sells and then sues on his covenant or bond, proceedings will be stayed, as so suing opens the foreclosure; but (2) that if having a power of sale, he exercises that power *bond fide*, and the proceeds of the sale do not realise enough to pay the mortgage debt, he will not be restrained from suing on his covenant for the deficiency.

It may be added that, in case of bankruptcy of the mortgagor, this right is accorded by statute; as is shown *infra*.

Mortgagee in Possession.—As already stated, a mortgagee may enter into possession of the mortgaged property and receive the rents thereof to be applied in payment first of the interest and then of the principal. He must, however, keep an account of the rents he receives and the payments he makes; and he is liable to account not only for the rents he has received but also for the rents which, but for his wilful default, he might have received; and if he assigns over his mortgage without the assent of the mortgagor he is still bound to answer for the profits both before and after the assignment, though assigned only for his own debt. He must pay an occupation rent for such part, if any, as he keeps in his own possession.(a) Having taken possession of the mortgaged property, he is not entitled to give up possession at his pleasure.(b)

The mortgagee is not entitled to make any charge for his personal trouble in receiving the rents. But he is entitled out of the profits to repay himself all necessary expenses attending the collection of the rents.(c)

It is the duty of the mortgagee in possession to keep the premises in necessary repair, and for sums paid for this purpose he will be allowed. But he will not be allowed for permanent or substantial improvements without showing a case for them.(d)

A mortgagee in possession must not commit waste.(e) He may, however, work mines under a freehold estate if the security is insufficient, the proceeds going towards payment of interest, principal, and costs.(f) So, save under the provisions of the Conveyancing Act, 1881, he cannot cut timber unless the security is insufficient, and then the proceeds must be applied in payment of interest, principal, and costs.(g) And by sect.

(a) Robbins, Mortg. 801-803, 1202; Story's Eq., sects. 1016, 1016 b.; Coote, Mortg. 654, 741, 4th edit.; Seton on Decrees, 1066, 4th edit.

(b) *Re Prytherch*, 42 Ch. Div. 590; 59 L. J. 79, Ch.

(c) *Godfrey v. Watson*, 3 Atk. 518; Robbins, Mortg. 1192, 1203.

(d) *Tipton Green Colliery Company v. Tipton Moat Colliery Company*, 7 Ch. Div. 192; 47 L. J. 152, Ch.

(e) Coote, Mortg. 813, 5th edit.; Robbins, Mortg. 804.

(f) *Millet v. Davey*, 31 Beav. 470; 32 L. J. 122, Ch.; 7 L. T. Rep. N. S. 551.

(g) Coote, Mortg., 813, 5th edit.; Hood & Challis, Conv. 80, 5th edit.; Robbins Mortg. 804.

19 (iv.) of the above Act, where the mortgage is made after 31st Dec., 1881, and there is no stipulation to the contrary in the deed, a mortgagee in possession may, as already (a) shown, cut and sell timber fit for cutting, not being ornamental timber.

The accounts ordered against a mortgagee in possession will sometimes be ordered with annual rests, i.e., a balance of rents and interest to be struck at the end of each year, and the surplus rents applied in reduction of the mortgage debt.(b)

As a general rule the accounts will not be so ordered if the interest is in arrear at the time when the mortgagee took possession. But where no interest is in arrear at the time he takes possession the account is ordered with annual rests.(c)

If an advowson is mortgaged and the living becomes vacant, the right of presentation is substantially in the mortgagor and not in the mortgagee; for the mortgagee is bound to present the nominee of the mortgagor.(d)

If a mortgagee in fee enters into possession and dies, although his widow might be entitled to dower at law, she would be restrained in equity from asserting that right,(e) and need not concur in a reconveyance of the property, unless, indeed, all equity of redemption be clearly barred.(f)

Receiver.—As to a mortgagee's power to appoint a receiver, see *ante*, pp. 197, 203.

Leases.—As to a mortgagee's power of granting leases, see *ante*, p. 194.

Proceedings on Bankruptcy of Mortgagor.—If the mortgagor becomes bankrupt the mortgagee may either (1) realise his security and prove for any balance still due to him; or (2) surrender his security to the official receiver or trustee for the general benefit of the creditors, and prove for the whole debt; or (3) he may assess the value of his security and prove for the balance due to him after deducting such value.(g) It does not seem advisable that he should sue for foreclosure.(h)

A mortgagee having a power of sale may sell without the aid of the Court of Bankruptcy, and the court will not generally interfere with the exercise of the power without requiring the amount due to the mortgagee to be paid into court, or other ample security being given to him, unless some person swears to his belief that there are facts which justify the court in interfering, as where the validity of the deed is actually impeached.(i)

(a) *Ante*, p. 198.

(b) Robbins, *Mortg.* 1207.

(c) *Nelson v. Booth*, 3 De G. & J. 119; *Ashworth v. Lord*, 36 Ch. Div. 545; 58 L. T. Rep. N. S. 18.

(d) *Mackenzie v. Robinson*, 3 Atk. 559; Coote, *Mortg.* 42, 5th edit.

(e) *Flack v. Longmate*, 8 Beav. 420; Coote on *Mortg.* 1123, 5th edit.; Dart's *V. & P.* 586, 6th edit.

(f) Dart. *sup.*

(g) 46 & 47 Vict. c. 52, s. 9, and sched. 2, rr. 9-11. See also Bk. R. 1886, rr. 73-77.

(h) See Will. Bk. 377, 7th edit., and cases there cited.

(i) *Ex parte Bayley*; *Re Hart*, 15 Ch. Div. 223; 43 L. T. Rep. N. S. 181; 29 W. R. 28; *Re Evelyn* (1894), 2 Q.B. 302.

If, however, the trustee in bankruptcy is dissatisfied with the assessed value put upon the mortgage, he may require the property to be offered for sale at a time and on conditions agreed between him and the mortgagee, or as the court directs.(a)

Where a first mortgagee surrenders his security to the trustee in bankruptcy he simply puts the trustee in his place, and the rights of a subsequent mortgagee are in no way accelerated thereby.(b)

By 46 & 47 Vict. c. 52, s. 55 (amended by 53 & 54 Vict. c. 71, s. 13), the trustee in bankruptcy may disclaim any property of the bankrupt which consists of land of any tenure burdened with onerous covenants, or of property that is unsaleable, &c., in accordance with the terms of the Acts, and rules made thereon. This disclaimer, as from its date, determines the interests and liabilities of the bankrupt in respect of the property disclaimed, and also discharges the trustee.

If, however, the bankrupt has, before his bankruptcy, created a mortgage or charge upon his leasehold property, the leave of the Court must be obtained before it can be disclaimed, unless the trustee serves the mortgagee with notice of his intention to disclaim, and the mortgagee does not require the matter to be brought before the Court (sect. 55, sub-sect. 3, Bk. R. 320, Nov. 1890.)

Indeed, where the mortgage is by way of assignment of the residue of the whole term, subject only to the proviso for redemption, no disclaimer by the trustee is necessary, as this equity of redemption does not come within sect. 55.(c)

By sect. 55, sub-sect. 6, the Court may by order vest the disclaimed property in any person entitled thereto, but if it be of a leasehold nature the order will not be made in favour of a person claiming under the bankrupt, whether he be sub-lessee or mortgagee by demise, except on the terms of his becoming subject to the same liabilities as the bankrupt was subject to. However, by 53 & 54 Vict. c. 71, s. 13, these terms may be modified by the Court, if it thinks fit.

Loss of Deeds.—A mortgagee who has lost the muniments of title will, it seems, be compelled to replace such as can be replaced, and as respects originals, which cannot be replaced, either to give an indemnity, or to make compensation for the damage thereby done to the estate.(d) And it seems if a bond of indemnity be given and costs paid, and a reconveyance be executed by the mortgagee, the mortgagor can be compelled to pay the amount due.(e)

(a) 46 & 47 Vict. c. 52, sched. 2, r. 12.

(b) *Cracknall v. Janson*, 6 Ch. Div. 735; 46 L. J. 652, Ch.; 37 L. T. Rep. N. S. 118; 26 W. R. 904.

(c) *Re Gee, Ex parte Official Receiver*, 24 Q. B. Div. 65; 59 L. J. 16, Q. B.; 61 L. T. Rep. N. S. 645; 38 W. R. 143.

(d) *Middleton (Lord) v. Elliott*, 15 Sim. 531; *James v. Rumsey*, 11 Ch. Div. 398; 48 L. J. 345, Ch.; 27 W. R. 617.

(e) *Stokoe v. Robson*, 19 Ves. 385.

A mortgagee, or transferee of a mortgage, has no right to keep copies of the mortgage deed or deed of transfer after he is paid off.(a)

Of Redemption, Reconveyance, and other Rights of a Mortgagor.

Redemption.—A mortgagor is, as already (*ante*, pp. 180, 182) shown, entitled to redeem the mortgaged estate on payment of the principal money, interest, and costs due to the mortgagee or his representatives, until this right is lost by lapse of time; (b) or by the fraud of the mortgagor, as where he makes a second mortgage of the property, without giving notice to the second mortgagee of the prior charge.(c)

All persons who have a legal or equitable interest in or lien upon the property are entitled to redeem a mortgage. For example, the heir or devisee, a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a remainderman,(d) and also a tenant for years under an agreement made by the mortgagor and not binding on the mortgagee.(e)

And it must be remembered that by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, in case of a death after 31st December, 1897, real estate vested in any person without a right of survivorship in any other person, devolves upon and becomes vested in his personal representative like a chattel real, notwithstanding any testamentary disposition. Copyholds, however, being excluded.(f) The marginal note to sect. 1 is "Devolution of legal interest in real estate." It is conceived, however, that the words of the section itself are wide enough to include equitable as well as legal interests in realty. If so the equity of redemption in fee vested in a mortgagor who dies after the above date will, in the first instance, vest in the personal representative, who for the necessary purpose of administration might redeem the mortgage.

A remainderman cannot redeem without the consent of the tenant for life, if the latter has procured an assignment of the mortgage, or if the mortgagee has procured an assignment of the interest of the tenant for life.(g)

As will be shown more fully subsequently, by 37 & 38 Vict. c. 57, where a mortgagee has obtained possession of the mortgaged property, the mortgagor must bring his action to redeem the mortgage within

(a) *Re Wade and Thomas*, 17 Ch. Div. 348; 50 L. J. 601, Ch.; 44 L. T. Rep. N. S. 599; 29 W. R. 625.

(b) 37 & 38 Vict. c. 57, s. 7; *et post*, tit. "Stat. of Limitations."

(c) 4 & 5 Will. & Mary, c. 16.

(d) *Storey's Eq.* s. 1023; *Robbins, Mortg.* 693; *Pearce v. Morris*, 5 Ch. App. 227.

(e) *Tarn v. Turner*, 39 Ch. Div. 456; 57 L. J. 1085 Ch.; 59 L. T. Rep. N. S. 742.

(f) See fully *ante*, p. 29, *et post*, tit. "Wills."

(g) *Fisher on Mortg.* 708, 4th edit.; *Coote on Mortg.* 1166, 5th edit.; *Ravald v. Russell*, Young, 9, 21; *Prout v. Cock* (1896), 2 Ch. 808; 75 L. T. Rep. N. S. 409; 66 L. J. 24, Ch.; 45 W. R. 157.

twelve years next after such possession obtained, or a written acknowledgment of the mortgagor's title, or right of redemption given (sect. 7). This period is an absolute bar, and is not extended by any disability of the mortgagor; as an action for redemption is not an action to recover land.(a)

A person cannot redeem before the time fixed by the mortgage deed for repayment.(b)

By the 44 & 45 Vict. c. 41, s. 15, where a mortgagor is entitled to redeem, he now has power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt, and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee is bound to assign and convey accordingly (sub-sect. 1); unless the mortgagee is, or has been, in possession (sub-sect. 2). The section is retrospective, and cannot be ousted by stipulation to the contrary (sub-sect. 3).

Prior to this enactment it was thought that, *stricto jure*, a mortgagee could not be compelled to assign the mortgage debt on redemption, either by the mortgagor or by a stranger, though he was bound to convey the estate.(c)

And it has been held, on the construction of the above section, that, if there be first and subsequent mortgagees of the same estate, the mortgagor cannot require the first mortgagee to assign the debt and property to a nominee of his own, under this section, without the consent of the puisne mortgagees.(d).

However, it is provided by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 12, that the right of the mortgagor, under sect. 15 of the 44 & 45 Vict. c. 41, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

As to the bearing of this enactment upon the decision in *Teeran v. Smith*, supra, it will be noticed that sect. 15 of 44 & 45 Vict. c. 41 can now be taken advantage of by the mortgagor notwithstanding any intermediate incumbrance; but a requisition by an incumbrancer is to prevail over a requisition by the mortgagor. As to the definition of "Mortgagor," see sect. 2 (vi), *et ante*, p. 181.

It will be observed that a mortgagee who is or has been in possession is excluded from the operation of sect. 15 of 44 & 45 Vict. c. 41; for, as already stated, a mortgagee in possession who assigns his mortgage without

(a) *Forster v. Patterson*, 17 Ch. Div. 132; 50 L. J. 603, Ch.; 44 L. T. Rep. N. 465; 29 W. R. 463; *et post*, tit. "Statutes of Limitations."

(b) See *ante*, p. 182.

(c) Coote, *Mortg.* 802, 5th edit.

(d) *Teeran v. Smith*, 20 Ch. Div. 724.

the assent of the mortgagor is answerable for the rents and profits after, as well as before, such assignment.(a) And a second incumbrancer might go into possession and be ousted by the first mortgagee, which renders it necessary to exclude a mortgagee who has been in possession.(b)

A tenant for life of mortgaged premises, who has failed to keep down the interest, and who has obtained an order in an action permitting him to redeem the mortgage on terms, is not of right entitled under sect. 15 of the 44 & 45 Vict. c. 41, to require the mortgagee to transfer the mortgage debt and premises to a third person.(c)

Mortgagor in Possession.—A mortgagor in possession is treated in equity, as already (*ante*, p. 183) stated, as owner of the property for most purposes. Thus he may, so long as the mortgagee does not interfere, take the rents and profits of the estate without rendering any account to the mortgagee.(d) Yet he will not be permitted to do anything which may diminish the security of the mortgagee, and cannot therefore commit waste. Yet he may cut timber unless it is proved that the security is insufficient.(e)

By 36 & 37 Vict. c. 66, s. 25, a mortgagor entitled to possession or receipt of the rents and profits of the land, as to which no notice of his intention to take possession or enter into receipt of such rents and profits has been given by the mortgagee, may sue for such possession, or recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (sub-sect. 5).

Notwithstanding this sub-sect., and sub-sect. 1 of sect. 24, an equitable owner, who is seeking to recover possession, must still make the person who has the legal estate a party to the action.(f)

And by 44 & 45 Vict. c. 41, s. 18, a mortgagor in possession, where the mortgage is made after 31st December, 1881, may make the leases specified *ante*, p. 194.

Production of Deeds.—By 44 & 45 Vict. c. 41, s. 16, a mortgagor, so long as his right to redeem subsists, is to be entitled from time to time, at reasonable times, on his request and at his cost, and on payment of the mortgagee's costs and expenses, to inspect and make copies, or abstracts of, or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This section applies only to mortgages made after 31st December, 1881, but is to have effect notwithstanding any stipulation to the contrary (sub-sects. 1, 2).

Prior to this enactment it was laid down that the mortgagee was not bound to produce his mortgage deed, or, indeed, any of the title deeds in his possession, to the mortgagor or any person claiming under him. until payment of the principal and interest due, and his costs, though the

(a) See *ante*, p. 229.

(b) Wolst. & T. Conv. 52, 5th edit.

(c) *Alderson v. Elgey*, 26 Ch. Div. 567; 50 L. T. Rep. N. S. 505; 32 W. R. 632.

(d) *Ex parte Wilson*, 2 Ves. & B. 252.

(e) *King v. Smith*, 2 Hare 239.

(f) *Allen v. Woods*, 68 L. T. Rep. N. S. 143, C. A.

application was made *bond fide*, only to obtain information with a view to paying off the mortgage.(a)

Judgment for Sale.—We have before shown (*ante*, p. 227) that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of redemption; and upon what terms the order will be made.

Consolidation of Mortgages.—The 44 & 45 Vict. c. 41, s. 17, further provides that a mortgagor seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem (sub-sect. 1); unless a contrary intention is expressed in the mortgage deeds, or one of them (sub-sect. 2). The section applies only where the mortgages, or one of them, are or is made after the 31st December, 1881 (sub-sect. 3).

Prior to this enactment it was held that, if a mortgagor mortgaged one estate to a mortgagee to secure a sum of money, and then mortgaged another estate to the same mortgagee to secure another sum of money, the mortgagor, or the assignee of the equity of redemption of the mortgage sought to be redeemed, could not, adversely to the mortgagee, redeem one estate without redeeming both; for it was said the mortgagee had the right to consolidate the two mortgages, and to insist on both being paid off together.(b) In a more recent case, however, where a mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the same mortgagee, and the assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages; it was held, however, that the right of the purchaser of the equity of redemption could not be affected by a mortgage made after his purchase, and that he was entitled to redeem the first mortgage without redeeming the second.(c)

In another case where two mortgages made by the same mortgagor (prior to the Conveyancing Act, 1881) to different mortgagees on different estates became united for the first time in one person *after* the mortgagor had assigned the equity of redemption of *one* of them, it was held that the owner of the two mortgages could not consolidate them as against such assignee of the equity of redemption.(d)

If, however, at the time when redemption is sought *all* the mortgages are presently redeemable by the same person it is otherwise. For it has been held that where several mortgages originally vested in several mortgagees

(a) *Spence's Eq.* 655; *Robbins, Mortg.* 814; *Chichester v. Donegal*, 5 Ch. App. 497; 39 L. J. 694, Ch.; 18 W. R. 531.

(b) *Vint v. Padgett*, 32 L. T. Rep. O. S. 66; 1 Giff. 446; *Watts v. Symes*, 1 De G. M. & G. 240; *Robbins, Mortg.* 856, 858.

(c) *Jennings v. Jordan* (1881), 6 App. Ca. 698; 45 L. T. N. S. 593; 51 L. J. 129, Ch.; 30 W. R. 369.

(d) *Harter v. Colman*, 19 Ch. Div. 630; 51 L. J. 481, Ch.; 46 L. T. Rep. N. S. 154; see also *Minter v. Carr* (1894), 3 Ch. 498; 71 L. T. Rep. N. S. 526, C. A.; 63 L. J. 705, Ch.

for distinct sums ultimately become united in one holder, the right of consolidation can be enforced not only against the original mortgagor, but also against the assignee of the equity of redemption of all, although the mortgages which it is sought to consolidate were not united in title in the mortgagee with the mortgage which it is sought to redeem until after the assignment of the equity of redemption of all. For the assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. The assignee of several equities knows what the mortgages are, subject to which he has purchased the property; and he knows that they may become united by transfer in one hand; whereas the purchaser of an equity of redemption of one estate does not investigate the title to mortgaged property of the same mortgagor which he had not bought and cannot therefore know to what mortgages it is subject.(a)

Since the operation of the above enactment consolidation of mortgages can only arise under the above section by express contract.

Reconveyance.—The day for payment of the mortgage debt having been fixed by a notice or otherwise, the solicitor for the mortgagor should, within a reasonable time before the expiration of this period, prepare the draft reconveyance, and forward a fair copy thereof to the solicitor for the mortgagee for his approval. The practice being the same as on a sale or mortgage. As to the searches to be made, see *ante*, p. 173. An appointment is arranged to take place at the office of the mortgagee's solicitor to execute the reconveyance, and pay the principal money and interest that may be due, and the costs and charges of the mortgagee's solicitor. On this being done, the title deeds, including all mesne transfers thereof, and deed of reconveyance must be given up to the mortgagor.(b)

A reconveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part 3 of sched. 3 to the 44 & 45 Vict. c. 41. with such variations and additions, if any, as circumstances may require (see sect. 29).

Deed of Statutory Reconveyance of Mortgage.

THIS INDENTURE made by way of statutory reconveyance of mortgage the day of 1884 between C. of [&c.] of the one part and B. of [&c.] of the other part supplemental to an indenture made by way of statutory transfer of mortgage, dated the day of 1883 and made between [&c.] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest C. hereby acknowledges the receipt C. as mortgagee hereby conveys to B. all the lands and hereditaments now vested in C. under the said indenture. To hold to and to the use of B. in fee simple, discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

* * * Variations as required, &c.

(a) *Pledge v. White* (1896), A. C. 187; 65 L. J. 449, Ch.; 74 L. T. Rep. N. S. 323.

(b) See Coote, *Mortg.* 1184, 5th edit.; *Re Wade and Thomas*, 17 Ch. Div. 348 *et ante*, p. 210.

If the above form be not used the several parts of a deed of reconveyance would, in ordinary cases, be the date, and parties, being the mortgagee of the one part, and the mortgagor of the other part; and if not made by supplemental deed, a recital of the mortgage, and any recitals that may be deemed necessary, follow; then comes the testatum whereby, in consideration of payment of principal and interest, the receipt of which is acknowledged, the mortgagee, as mortgagee, conveys to the mortgagor the mortgaged premises; habendum to the use of the mortgagor in fee simple free from the debt, &c.(a) The covenant that the mortgagee has done no act to incumber is here implied by the mortgagee being expressed to convey as mortgagee.

The form of statutory reconveyance given by the 44 & 45 Vict. c. 41 is by supplemental deed, but hitherto it has been considered advisable, where circumstances will permit, to have the reconveyance indorsed on the original mortgage deed, for then, when this deed is produced, it necessarily bears evidence of the reconveyance; and otherwise the reconveyance might be lost, and great difficulty experienced in proving its execution, or even that the mortgage debt had been paid.(b)

Copyholds.—Where the mortgaged estate is of copyhold tenure, and the mortgagee has not been admitted (see *ante*, p. 211), then when the mortgage is paid off it seems only to be necessary to enter an acknowledgment of satisfaction on the Court Rolls and to have a receipt for the money indorsed on the deed of covenants accompanying the conditional surrender. Still, it would seem proper to have a release and a covenant against incumbrances by the mortgagee. If the mortgagee has been admitted he must surrender the copyholds to the use of the mortgagor, who must be re-admitted tenant and pay the fine and fees thereon.(c) In case of his death, see *post*.

Leaseholds.—Where a mortgage of leaseholds is by way of sub-demise (*ante*, p. 212), then when the mortgage debt is paid off the deed of surrender is usually by way of supplemental deed to the mortgage deed, stating the effect of that deed; then the testatum follows, stating that in consideration of the payment of principal and interest, and its receipt, the mortgagee, as mortgagee, surrenders unto the mortgagor the mortgaged premises, to the intent that the residue of the term may be merged.

If the mortgage be by way of assignment of the term the chief difference is that in the testatum the mortgagee, as mortgagee, assigns to the mortgagor the mortgaged premises, to hold to him for the residue unexpired of the said term, freed and discharged from the mortgage debt, &c.(d)

Where a term of years is carved out of the inheritance and becomes satisfied and attendant upon the inheritance, the 8 & 9 Vict. c. 112

(a) See a form David. Conc. Pr. 307, 16th edit.

(b) 2 David. Conv. 828, pt. 2, 3rd edit.

(c) Scriv. Cop. 108, 7th edit.; 2 David. Conv. 117, 819, pt. 2, 4th edit.; 3 Byth. & Jarm. Conv. 763, 1196, 4th edit.

(d) See forms Byth. & Jarm. Conv. 1193, 1194, 4th edit.; 1 Prid. Conv. 662, 663, 16th edit.

enacts that it is then to cease. So that satisfaction of a mortgage debt would be a satisfaction and determination of a term so created to secure its payment.(a) However, it is usual to have an actual release of the property by deed, as evidence of satisfaction.

Death of Mortgagee.—Formerly, if a mortgagee of an estate in fee simple had died intestate, the mortgaged estate descended to his heir-at-law; equity, however, held him to be a trustee thereof for the personal representatives of the mortgagee, and compelled him to join in a reconveyance of the property without his being entitled to any part of the mortgage money. So, if the mortgagee had devised the mortgaged property, the devisee was bound to reconvey on payment to the legal personal representatives of the mortgagee.(b)

By the 37 & 38 Vict. c. 78, s. 4, however, it was enacted that the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee has been admitted, might, on payment of *all sums* secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust.

It was held that this enactment was confined to the case of payment off and reconveyance, and did not apply to a transfer.(c)

By 44 & 45 Vict. c. 41, s. 30, however, the above enactment is repealed as to cases of death occurring after the 31st Dec. 1881, and in lieu thereof it provides that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative in like manner as if the same were a chattel real vesting in them or him; with power for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and deal with the same, &c.

The deed of reconveyance would now in such an event be made between the personal representative of the mortgagee of the one part and the mortgagor of the other part; and might either be supplemental to the mortgage deed, or be indorsed on the mortgage deed, or be by an independent deed, and would state or recite the mortgage deed, also recite the death of the mortgagee, and the appointment of the executor, and proof of the will. The testatum follows, whereby in consideration of the payment of the mortgage debt and interest, the receipt of which is acknowledged, the executor as personal representative, conveys to the mortgagor the mortgage premises, to hold to him in fee simple freed and discharged from the mortgage debt, &c.(d)

(a) See hereon 2 David. Conv. 822, pt. 2, 4th edit.

(b) Will. Real. Pro. 432, 13th edit.

(c) *Re Spradbury's Mortgage*, 14 Ch. Div. 514.

(d) See a form, David. Conc. Pr. 308, 16th edit.; 3 Byth. & Jarm. Conv. 1197, 4th edit.

As already fully shown (a) by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), sect. 30 of the Conveyancing Act of 1881 is not to apply to copyhold or customary lands vested in the tenant on the Court Rolls on trust, or by way of mortgage (sect. 88).

If, therefore, the mortgagee has been admitted tenant on the Court Rolls, his heir at law or devisee would have to be a party to the surrender.

By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 28, where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money (*i.e.* as mortgagee), is an infant, the High Court may make an order vesting, or releasing, or disposing of the land or right in like manner as in the case of an infant trustee.(b) And by sect. 29, where a mortgagee of land has died without having entered into possession or into the receipt of the rents and profits, and the mortgage debt is paid off, &c., the Court may make a vesting order in the following cases: (1) Where an heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found; or (2) who on demand states in writing that he will not convey or does not convey the same for twenty-eight days after a proper deed has been tendered to him; or (3) where it is uncertain as to the survivor of several devisees of the mortgagee, or as to the heir or personal representative of the mortgagee being living or dead; or (4) where there is no heir or personal representative to a mortgagee who has died intestate as to the land, &c.

By sect. 33, in all cases where a vesting order can be made, the Court, if it is more convenient, may appoint a person to convey the land, or release the contingent right, &c.

By sect. 35 vesting orders may be made giving the right to transfer stock, and sue for choses in action.

By sect. 34, where a vesting order is made of copyholds with the consent of the lord of the manor, the land vests accordingly without surrender or admittance.

Lunacy.—If a mortgagee of land has become lunatic, then by the Lunacy Act, 1890 (53 Vict. c. 5), s. 135, application should be made to the judge in lunacy for a vesting order, or for an order appointing some person to convey, &c.; and by sect. 136 in the case of stock or choses in action, for an order vesting in any person the right to transfer, &c., such stock, &c., and sue for the choses in action.

By sect. 135, sub-sect. 5, where a vesting order is made of copyholds with the consent of the lord of the manor the land vests accordingly without surrender or admittance.

The costs of an ordinary reconveyance are borne by the mortgagor, or it seems also, in most cases, of a vesting order in lieu thereof.(c)

(a) *Ante*. pp. 26, 67.

(b) As to an infant trustee see sects. 26, 35.

(c) See Robbins, *Mortg.* 1430; 3 Byth. & Jarm. *Conv.* 899, 4th edit., and cases there cited.

Exoneration of Charges.

Formerly, if an estate in mortgage were devised or allowed to descend, the devisee or heir-at-law was usually entitled to have the mortgage debt paid off out of the testator's or intestate's personal estate, that estate being primarily liable, the land being only liable, between the real and personal representatives, to be resorted to if the personal estate should be insufficient for the payment of debts.(a) By the 17 & 18 Vict. c. 113, however, it is provided that when any person, after 31st Dec., 1854, dies seised of or entitled to any estate or interest in any lands or other hereditaments, which at his death are charged with a mortgage debt, and he has not by his will, deed, or other instrument signified any contrary intention, the heir or devisee of such lands or hereditaments is not entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the lands or hereditaments so charged are as between the different persons claiming under the deceased person, primarily liable to the payment of the mortgage debt charged thereon; the rights of the mortgagee are, however, reserved, as also the rights of any person claiming under any deed, will, or other document made before 1st Jan., 1855.

As to when a testator had shown a contrary intention, was open to doubts and to conflicting decisions.(b) The 30 & 31 Vict. c. 69, s. 1. after stating that doubts had arisen upon the construction of the 17 & 18 Vict. c. 113, enacts that, in the construction of a will of a person dying after 31st Dec., 1867, a general direction that the debts, or all the debts, of the testator shall be paid out of his personal estate, is not to be deemed to be a declaration of an intention contrary to 17 & 18 Vict. c. 113, unless such contrary intention be declared by words expressly, or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

By sect. 2, in the construction of the Acts, the word mortgage is to include a lien for unpaid purchase money upon any lands or hereditaments purchased by a testator, and by 40 & 41 Vict. c. 34 this is extended to a purchase by one who dies intestate, as already shown.(c)

Leaseholds for years were held not to be within the 17 & 18 Vict. c. 113, as the Act only speaks of "the heir or devisee," and leaseholds for years do not pass to them under these terms.(d) By the stat. 40 & 41 Vict. c. 34, however, leaseholds are brought within the provisions of the Acts as to a testator or intestate dying after 31st December, 1877, as the Acts are made to extend to lands of any tenure(e); and this Act also

(a) Will. Real Pro. 437, 13th edit.; and see *ante*, p. 32.

(b) See *Pembroke v. Friend*, 2 L. T. Rep. N. S. 742; 1 J. & H. 132; *Stone v. Parker*, 1 D. & S. 212; 3 L. T. Rep. N. S. 79; 29 L. J. 874, Ch.

(c) See *ante*, pp. 65, 66.

(d) *Solomon v. Solomon*, 10 L. T. Rep. N. S. 54; 12 W. R. 540.

(e) *Drake v. Kershaw*, 37 Ch. Div. 674; 58 L. T. Rep. N. S. 512; 57 L. J. 599 Ch.; 36 W. R. 413.

provides that a devisee, legatee, or heir shall not, as to a testator or intestate dying after the above date, have the mortgage debt paid out of any other estate of the testator or intestate, unless in the case of a testator he has within the meaning of the Acts signified a contrary intention, which is not to be deemed to be signified by a charge or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.(a)

Even prior to 40 & 41 Vict. c. 34, which extended the prior Acts to lands of any tenure, copyholds were held to be within 17 & 18 Vict. c. 113.(b)

An equitable mortgage secured by a memorandum of deposit of title deeds, was held to be within the Act 17 & 18 Vict. c. 113.(c) And the Acts are, by 40 & 41 Vict. c. 34, made to apply to any "equitable charge, including a vendor's lien for unpaid purchase money."(d) Land delivered in execution under an *elegit* to judgment creditors of the testator and specifically bequeathed by him subsequently was held to be within the Acts, and the devisee not entitled to have the land exonerated.(e).

Where real and personal estate are comprised in the same mortgage, the mortgage debt must, as between the devisees of the realty and the legatee of the personalty, be borne rateably by the real and personal estate subject thereto, and the real estate is not primarily liable to the payment thereof.(f)

The Act 17 & 18 Vict. c. 113 does not apply when a member of a firm of partners charges his private real estate for the purposes of the partnership, and then dies.(g)

Death of Mortgagor Intestate.

Formerly, if a person had made a mortgagee in fee and then died without any heir and intestate, his equity of redemption in the mortgaged estate became vested in the mortgagee, and did not escheat to the lord of the fee, as a trust estate is not a subject of tenure; but he did not take it absolutely, for it was still liable for the payment of the debts of the mortgagor, under an administration of his estate.(h) Now, however, the 47 & 48 Vict. c. 71 enacts that after the 14th August, 1884, where a person dies without an heir and intestate in respect of realty consisting of any equitable estate or interest in corporeal or incorporeal hereditaments, whether devised or not to trustees by his will, the law of escheat

(a) See *Re Campbell* (1893), 2 Ch. 206; 62 L. J. 594, Ch.; 68 L. T. Rep. N. S. 851; *Re Nevill*, 59 L. J. 511, Ch.; 62 L. T. Rep. N. S. 864.

(b) *Piper v. Piper*, 2 L. T. Rep. N. S. 458; 1 J. & H. 91.

(c) *Coleby v. Coleby*, L. R. 2 Eq. 803.

(d) See *Kemp v. Rozey*, 74 L. T. Rep. N. S. 664; *et ante*, p. 66.

(e) *Re Anthony* (1892), 1 Ch. 450; 61 L. J. 434, Ch.; 66 L. T. Rep. N. S. 181; 40 W. R. 316; (1893) 3 Ch. 498.

(f) *Trastraill v. Mason*, 7 Ch. Div. 655.

(g) *Re Bitson* (1899), 1 Ch. 128; 79 L. T. Rep. N. S. 455, C. A.

(h) *Beale v. Symonds*, 16 Beav. 406.

is to apply in the same manner as if such estate or interest were a legal estate in corporeal hereditaments (sect. 4, see also sect. 7).

Stamps on Mortgages, &c.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), provides for the stamp duties to be charged on mortgages. They are as follows :

Mortgage, Bond, Debenture, Covenant (except a marketable security otherwise specially charged with duty), and Warrant of Attorney to confess and enter up judgment.

- (1.) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—

	£	s.	d.
Not exceeding 10 <i>l.</i>	0	0	3
Exceeding 10 <i>l.</i> and not exceeding 25 <i>l.</i>	0	0	8
" 25 <i>l.</i> " 50 <i>l.</i>	0	1	3
" 50 <i>l.</i> " 100 <i>l.</i>	0	2	6
" 100 <i>l.</i> " 150 <i>l.</i>	0	3	9
" 150 <i>l.</i> " 200 <i>l.</i>	0	5	0
" 200 <i>l.</i> " 250 <i>l.</i>	0	6	3
" 250 <i>l.</i> " 300 <i>l.</i>	0	7	6
" 300 <i>l.</i>			

For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured 0 2 6

- (2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped :

For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured 0 0 6

- (3.) Being an equitable mortgage :

For every 100*l.*, and any fractional part of 100*l.*, of the amount secured 0 1 0

- (4.) Transfer, Assignment, Disposition, or Assignment of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment :

For every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disposed, exclusive of interest which is not in arrear 0 0 6

And also where any further money is added to the money already secured } The same duty as a principal security for such further money.

- (5.) Reconveyance, Release, Discharge, Surrender, Re-surrender, Warrant to Vacate, or Renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured :

For every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured(a) 0 0 6

For the purposes of the Act the expression "mortgage" means a security by way of mortgage for the payment of any definite and certain

(a) See 54 & 55 Vict. c. 39, Sch.

sum of money advanced or lent at the time or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be.

It also includes (1) conditional surrender by way of mortgage, further charge, &c., affecting any property, real or personal; (2) any conveyance of any property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale, &c., either by express stipulation or otherwise, not being a conveyance for the benefit of creditors generally, or for the benefit of specified creditors who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number; (3) any defeazance, &c., for defeating or making redeemable, &c., any conveyance, transfer, &c., of any property whatsoever, apparently absolute, but intended only as a security; and (4) any agreement (other than one chargeable as an equitable mortgage) or bond accompanied with a deposit of title deeds for making a mortgage, &c., of any property comprised in the title deeds, or for pledging or charging the same as a security. (5) Any deed operating as a mortgage of any stock or marketable security.(a)

For the purposes of the Act "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security) or creating a charge thereon (b), and is stamped as above. Prior to the Act 51 Vict. c. 8, s. 15 (now repealed), if the memorandum did not contain an agreement for granting a legal mortgage it did not require a stamp.(c)

By sect. 87 of the Act, after providing for duty on the transfer and retransfer of stock in certain cases (sub-sect. 1), it is enacted that a security for the payment of any rentcharge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.(d)

A transfer of a duly stamped security, and a security by way of further charge for money or stock added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, power, or stipulation in relation thereto, &c.(e)

(a) See further 54 & 55 Vict. c. 39, s. 86, sub-s. 1.

(b) 54 & 55 Vict. c. 39, s. 86, sub-s. 2.

(c) *Meek v. Bayless*, 31 L. J. 448, Ch.

(d) 54 & 55 Vict. c. 39, s. 87, sub-s. 2.

(e) *Id.*, sub-sect. 3.

Where copyhold or customary lands are mortgaged alone by a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of Court Roll of the surrender or grant, if made in court. But where such lands are mortgaged together with other property, for securing the same money or stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, &c., is not to be charged with any higher duty than 10s.(a)

An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for or according to his direction.(b)

A security for the payment or repayment of money to be lent, advanced, or paid, or to become due on any account current, either with or without money previously due, is to be charged, where the total amount secured or ultimately recoverable is limited, with the same duty as a security for the amount so limited. But where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, &c.(c)

Solicitor Mortgagee Costs.

Before closing this chapter it seems necessary to set out the provisions of the Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 2, which provides that a solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which the solicitor is a member, is to be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such professional charges and remuneration as he or they would have been entitled to receive if the mortgage had been made to a person not a solicitor who had employed such solicitor or firm to transact such business. &c., and such charges and remuneration are recoverable from the mortgagor (sub-sect. 1). But this section applies only to mortgages made after the commencement of the Act (sub-sect 2).

By sect. 3, any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission, or the firm of which the solicitor is a member, is to be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security or the property therein comprised, all such usual and professional charges and remuneration as he or they would

(a) 54 & 55 Vict. c. 39, s. 87, sub-s. 4, 5.

(b) 54 & 55 Vict. c. 39, s. 87, sub-s. 6; and see *Wall v. Commissioners*, 4 Ex. Div. 270; 48 L. J. 574, Ex.

(c) 54 & 55 Vict. c. 39, s. 88.

have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and he had employed such solicitor or firm to transact such business and do such acts, and the mortgage can only be redeemed on payment of such charges and remuneration (sub-sect. 1). And this section applies to mortgages made and business transacted and acts done either before or after the commencement of the Act (sub-sect. 2).

The expression "mortgage" includes any charge on any property for securing money or moneys worth (sect. 4).

The provisions of the above statute render the decision in *Re Doody*; *Fisher v. Doody*(a), which prohibited a solicitor mortgagee from charging profit costs, inoperative.

(a) 62 L. J. 14, Ch.; 68 L. T. Rep. N. S. 128; (1893) 1 Ch. 129.

CHAPTER V.

BILLS OF SALE.

Transfer of Personal Chattels.

THE property in personal chattels may be transferred by contract of sale, (a) by deed, or by actual delivery. Where they are transferred as a gift, however, there must be either delivery of the chattels or a deed. (b) The delivery may, however, precede the words of gift. (c) If it is not possible to make an immediate and complete delivery of the thing given, then as near an approach thereto as is possible must be made, thus, if the goods be in a warehouse, the delivery of the key will, it seems, be sufficient. (d)

A deed or other instrument transferring the property in chattels is usually called a bill of sale, which may be (1) absolute, entitling the grantee to immediate possession, or (2) conditional, entitling him to take possession on the performance or non-performance of certain conditions, as in the case of a bill of sale by way of mortgage, where the grantor or mortgagor retains possession of the chattels until default in payment.

There are several statutes which affect the assignment of goods and chattels, intended to prevent fraud, or are for the protection of creditors generally. By 13 Eliz. c. 5, any gift, grant, or alienation of lands or tenements, goods or chattels, made for the purpose of defeating or delaying creditors, unless made upon good (which means valuable) consideration and *bonâ fide* to some person not having at the time notice of the fraud is void. (e) So far as regards bills of sale, however, the Bills of Sale Act, 1878, and the Amendment Act of 1882, with certain provisions in the Bankruptcy Act, 1883, now make special provision for their regulation, to be noticed presently.

(a) As to the sale of goods under 10l., see *post*.

(b) *Irons v. Smallpiece*, 2 B. & A. 551; *Cochrane v. Moore*, 25 Q. B. Div. 57; 59 L. J. 377, Q. B.; 63 L. T. Rep. N. S. 153, C. A.

(c) *Alderson v. Peel*, 64 L. T. Rep. N. S. 645; *Kilpin v. Ratley*, 66 Id. 797; (1892) 1 Q. B. 582.

(d) *Ward v. Audland*, 16 M. & W. 871; *Kilpin v. Ratley*, *sup.*; 1 Prid. Conv. 734, 17th edit.

(e) See *Twyne's Case*, Sm. L. C., vol. 1.

By 56 & 57 Vict. c. 71, s. 4, a contract for the sale of any goods of the value of 10*l.* or upwards is not to be enforceable by action unless the buyer accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf (sub-sect. 1).*(a)*

This section applies to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, or provided, or fit or ready for delivery, &c. (sub-sect. 2).*(b)*

There is an acceptance of goods within this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not (sub-sect. 3).

"Goods" include all chattels personal, other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (sect. 62.)

An agreement letter or memorandum made for or relating to the sale of any goods, wares, or merchandise, is exempt from stamp duty.*(c)*

It should also be remembered that a conveyance or assignment of property may amount to an act of bankruptcy. By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (a), a debtor commits an act of bankruptcy if he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

This was held to mean of all his property*(d)*; in a more recent case, however, where certain leaseholds were excepted from the assignment, as to which the debtor covenanted to stand possessed in trust to convey as the trustees should direct, the deed was held to be an act of bankruptcy.*(e)*

But such an assignment, if for the benefit of the assignor's creditors, is not a bill of sale.*(f)*

By the same section (b) it is also an act of bankruptcy if the debtor makes a *fraudulent* conveyance, gift, delivery or transfer of his property or any part thereof.

If the consideration for the conveyance of all the debtor's property is a *past* debt, the transaction is fraudulent. But if it is for a past debt and a

(a) This sub-sect. replaces the 17th Sect. of the Stat. Frauds, which latter section is repealed by sect. 60 and Sched. of 56 & 57 Vict. c. 71.

(b) This sub-section is a re-enactment of sect. 7 of 9 Geo. 4, c. 14, which section is repealed by sect. 60 and Sched. of 56 & 57 Vict. c. 71.

(c) 54 & 55 Vict. c. 39, Sched. "Agreement."

(d) *Re Foley*; *Ex parte, Spackman*, 24 Q. B. Div. 728; 59 L. J. 806, Q. B.; 62 L. T. Rep. N. S. 849; 38 W. R. 497.

(e) *Re Hughes* (1893), 1 Q. B. 595; 62 L. J. 358, Q. B.; 41 W. R. 466.

(f) 41 & 42 Vict. c. 31, s. 4; *et post*.

further advance the test is whether the lender made such advance to enable the debtor to carry on his business, and with a reasonable belief that the advance would have that effect. If the affirmative of this is proved, the deed is not an act of bankruptcy.(a)

What Is a Bill of Sale.

By the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31) "bill of sale" is to include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels; and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt; and also any agreement, whether intended or not to be followed by any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (sect. 4).

And by sect. 6, as already seen,(b) every attornment or instrument, not being a mining lease, giving a power of distress by way of security for any present or future debt or advance, and whereby any rent is reserved, &c. as a mode of providing for the payment of interest thereon, or otherwise for the purpose of such security only, is to be deemed a bill of sale of any personal chattels which may be taken under the power of distress. But this section is not to extend to any mortgage of any estate or interest in lands, tenements, or hereditaments, which the mortgagee, being in possession, has demised to the mortgagor as his tenant at a fair and reasonable rent. The effect of this proviso has already been discussed.(c)

As to receipts, a receipt with or without an inventory, must be an assurance of personal chattels to fall within the category of bills of sale under the Act.(d)

An ordinary trade hiring agreement, containing a licence to retake goods which are not to become the property of the hirer until the instalments are paid, is not a bill of sale.(e)

A license to take possession of personal chattels must be "as security for a debt"; therefore, where a building agreement between a landowner and a builder contained a stipulation that the landowner, upon default in the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and, thereupon all the

(a) *Ex parte Johnson*; *Re Chapman*, 26 Ch. Div. 338; 53 L. J. 762, Ch.; 50 L. T. Rep. N. S. 214; 32 W. R. 693.

(b) *Ante*, p. 208.

(c) See *ante*, p. 208.

(d) *Manchester, Sheffield, and Lincoln Railway v. North Central Waggon Co.*, 13 App. Cas. 554, 569; 58 L. J. 219, Ch.; 37 W. R. 305; *Marsden v. Marsden*, 7 Q. B. Div. 80; 50 L. J. 536, Q. B.; 45 L. T. Rep. N. S. 301; 29 W. R. 816; *Ramsay v. Margett* (1894), 2 Q. B. 18; 63 L. J. 513, Q. B.; 70 L. T. Rep. N. S. 788, C. A.

(e) *Ex parte Crawcour*, 9 Ch. Div. 419; 47 L. J. 94, Bk.; *Crawcour v. Saller*, 18 Ch. Div. 30; 51 L. J. 494, Ch.; 45 L. T. Rep. N. S. 62; 30 W. R. 21; but see *Madell v. Thomas*, (1891) 1 Q. B. 231; 64 L. T. Rep. N. S. 9.

materials then in and about the premises should be forfeited to and become the property of the landowner as and for stipulated damages, it was held that the stipulation was not a bill of sale.(a)

But where, under somewhat similar facts, the deed of assignment provided that in case of default in payment of the mortgage debt the mortgagee might sell all or any part of the premises and the building materials either together or in parcels, the deed was held to be a bill of sale, as it gave the mortgagee power to sell the chattels apart from the land.(b)

A brewer's agreement giving power to the landlord to distrain in case of non-payment of malt liquors supplied to the tenant is a bill of sale, being a "licence to take possession as a security for a debt," and requires registration.(c)

Where goods are pledged as security for a loan and delivered to the pledgee, a document signed by the pledgor merely recording the transaction and regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale.(d)

It is usual, although not necessary, that a bill of sale should be contained in one instrument; and where two documents together constitute one security they must be regarded as one transaction for the purpose of ascertaining whether they constitute a bill of sale.(e)

What is not a Bill of Sale.

By the Bills of Sale Act, 1878, s. 4 (f), the expression "bill of sale" does not include assignments for the benefit of the creditors of the person making the same, marriage settlements, transfers of ships, or of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising by indorsement or delivery the possessor thereof to transfer or receive the goods thereby represented; or, by the Bills of Sale Acts 1890 and 1891, securities on imported goods given before their deposit in a warehouse, &c., or reshipment for export or delivery to a purchaser, &c.(g)

(a) *Ex parte Newitt*; *Re Garrud*, 16 Ch. Div. 522; 51 L. J. 381, Ch.; 44 L. T. Rep. N. S. 5; 29 W. R. 344.

(b) *Climpson v. Coles*, 23 Q. B. Div. 465; 58 L. J. 346, Q. B.; 61 L. T. Rep. N. S. 116; 38 W. R. 110.

(c) *Stevens v. Marston*, 60 L. J. 192, Q. B.; 64 L. T. Rep. N. S. 274; 39 W. R. 129; *et ante*, p. 207.

(d) *Ex parte Hubbard*; *Re Hardwick*, 17 Q. B. Div. 690; 55 L. J. 490, Q. B.; 59 L. T. Rep. N. S. 172; 35 W. R. 2, C. A.; *Re Cunningham*, 28 Ch. Div. 682; 33 W. R. 387; 54 L. J. 448, Ch.

(e) *Ex parte Odell*; *Re Walden*, 10 Ch. Div. 76; 48 L. J. 1. Bk.; 39 L. T. Rep. N. S. 333; 27 W. R. 274; *Edwards v. Marcus* (1894), 1 Q. B. 587; 63 L. J. 363, Q. B.

(f) 41 & 42 Vict. c. 31.

(g) See 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

By the Act of 1882 (*a*), "bill of sale" is to have the same meaning as in the Act of 1878, but is confined to such bills of sale as are given by way of security for the payment of money (sect. 3), and does not apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, and effects of such company (sect. 17).

An assignment for the benefit of creditors must, to come within the exception, be for the benefit of all the creditors generally. (*b*)

A *post* nuptial settlement of chattels, not made in pursuance of *ante* nuptial articles, is not within the exception, and requires registration. (*c*)

The words in sect. 17 of the Act of 1882 (*supra*), "or other incorporated company," are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies. The mortgages or charges of any incorporated company for the registration of which provision has been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not bills of sale within the Bills of Sale Act, 1878. (*d*) But the debentures of an industrial society, formed under the Industrial and Provident Societies Acts, charging the society's personal chattels with the payment of money, are not exempted by sect. 17 of 45 & 46 Vict. c. 43 from the statutory requirements in respect of bills of sale. Such a society is not a "company" within any legal definition of that word. (*e*)

Application of the Acts.

The Bills of Sale Act, 1878 (*f*), applies (so far as not repealed) to every bill of sale executed on or after the 1st January, 1879, whether absolute or subject or not to any trust, whereby the holder or grantee has power either with or without notice, and either immediately or at a future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (sect. 3). The Bills of Sale Act, 1882 (*g*), enacts that that Act and the Act of 1878 are, as far as consistent, to be construed together; but, unless the context otherwise requires, the Act of 1882 is not to apply to any bill of sale registered before its commencement (1st November, 1882), so long as the registration thereof is not avoided by non-renewal or otherwise. (*h*) It has been held, however, that sect. 7 of the Act (*post*) applies to goods seized after the Act

(*a*) 45 & 46 Vict. c. 43.

(*b*) See *Boldero v. London Discount Co.*, 5 Est. Div. 47; *Baldw. Bank*. 312, 7th edit.; *Reed*, Bills of Sale, 55, 8th edit.

(*c*) *Fowler v. Foster*, 28 L. J. 210, Q. B.; *Ashton v. Blackshaw*, L. R. 9 Eq. 510; 39 L. J. 205, Ch.

(*d*) *Re Standard Manufacturing Company* (1891), 1 Ch. 627; 60 L. J. 292, Ch.; 64 L. T. Rep. N. S. 487; 39 W. R. 369.

(*e*) *Great Northern Railway Company v. Coal Co-operative Society* (1896), 1 Ch. 187; 65 L. J. 214, Ch.; 73 L. T. Rep. N. S. 443.

(*f*) 41 & 42 Vict. c. 31, s. 3.

(*g*) 45 & 46 Vict. c. 43.

(*h*) See sects. 2, 3; *Hickson v. Darlow*, 23 Ch. Div. 690; 52 L. J. 453, Ch.; 31 W. R. 417.

commenced under a bill of sale executed and registered before the Act operated.(a) So sect. 13 applies to seizures of goods under bills of sale registered before the operation of the Act. But the Act does not apply to absolute bills of sale, only to bills of sale given as security for the payment of money. Absolute bills of sale are still subject to the provisions of the Bills of Sale Act, 1878.(b)

Personal Chattels.

By the Bills of Sale Act, 1878, s. 4, the expression "personal chattels" means goods, furniture, and other articles capable of complete transfer by delivery and (when *separately* assigned or charged), fixtures and growing crops; but not chattel interest in real estate, nor fixtures (except trade machinery) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow; nor shares or interests in stocks or funds or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant, or agreement, or the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving such bill of sale (sect. 4).

Trade Machinery.—By sect. 5 of the Act of 1878 trade machinery is to be deemed to be personal chattels, and any mode of disposition thereof by the owner which would be a bill of sale as to any other personal chattels is to be deemed to be a bill of sale within the Act.

"Trade machinery" means the machinery used in or attached to any factory or workshop, (1) exclusive of the fixed motive-powers, such as the water-wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and (2) exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and (3) exclusive of the pipes for steam, gas, and water in the factory or workshop. The machinery or effects above excluded from the definition of trade machinery are not to be deemed to be personal chattels within the meaning of the Act.

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes or any of them; that is (i.) in or incidental to the making any article or part of an article; or (ii.) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (iii.) in or incidental to the adapting for sale any article (sect. 5).

(a) *Ex parte Cotton*, 11 Q. B. Div. 301; 49 L. T. Rep. N. S. 52; 32 W. R. 58.

(b) *Swift v. Pannell*, 24 Ch. Div. 210; 53 L. J. 341, Ch.; 48 L. T. Rep. N. S. 351; 31 W. R. 543; *Casson v. Churchley*, 53 L. J. 335, Ch.; 50 L. T. Rep. N. S. 568; *Heseltine v. Simmons*, (1892) 2 Q.B. 547, 552; 62 L. J. 5, Q.B.; 67 L. T. Rep. N. S. 611.

An assignment of the articles excepted from trade machinery by this section does not require registration.(a)

A mortgage of freehold land and buildings, in which there is trade machinery, but to which no reference is made, is not an assurance of personal chattels within sect. 4 of the Bills of Sale Act, 1878, and does not require to be registered if no power be given to sever and sell the trade machinery apart from the freehold. Nor does the power of sale implied by the Conveyancing Act, 1881, s. 19, give any such power.(b) But it would be otherwise if a power to take and sell the trade machinery apart from the land were given by the deed.(c) And where there was a mortgage of land "together with fixed and moveable plant, machinery and fixtures, implements, &c., in the premises," with the implied power of sale under the Conveyancing Act, 1881, and not registered, it was held void with respect to the trade machinery.(d)

As already seen, fixtures and growing crops, when separately assigned or charged, are to be deemed "personal chattels" within sect. 4 of the Bills of Sale Act, 1878. But by sect. 7, no fixtures or growing crops are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person (sect. 7). Trade machinery must, however, be distinguished. And see further, as to fixtures, *ante*, p. 186.

After - Acquired Property.—Formerly it was a common practice to include in a bill of sale not only particular chattels in the grantor's possession at the time of the grant, but also chattels to be subsequently acquired in substitution for or in addition to them. At law, as a rule, the only benefit derived thereby as to the after-acquired effects was a power or licence to seize them whenever they came into the grantor's possession.(e) In equity, however, an assignment for value of effects to be afterwards acquired, if so described as to be capable of being identified, operated to pass the property in the goods to the grantee as soon as they were acquired.(f) And since the Judicature Acts, if the chattels are

(a) *Topham v. Greenside*, 37 Ch. Div. 281 ; 57 L. J. 583, Ch. ; 58 L. T. Rep. N. S. 274 ; 36 W. R. 464.

(b) *Re Yates* ; *Batchelder v. Yates*, 38 Ch. Div. 112 ; 57 L. J. 697, Ch. ; 59 L. T. Rep. N. S. 47 ; 36 W. R. 563, C. A.

(c) *Climpson v. Coles*, 23 Q. B. 465 ; 58 L. J. 346, Q. B. ; 61 L. T. Rep. N. S. 116 ; 38 W. R. 110.

(d) *Small v. National Provincial Bank* (1894), 1 Ch. 686 ; 63 L. J. 270, Ch. ; 70 L. T. Rep. N. S. 492 ; 42 W. R. 378 ; but see *Re Brooks* (1894), 2 Ch. 600 : 64 L. J. 21, Ch. ; 71 L. T. Rep. N. S. 398.

(e) 1 Prid. Conv. 749, 16th edit. ; Robbins, Mortg. 211.

(f) *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191 ; 33 L. J. 193, Ch. ; 7 L. T. Rep. N. S. 172 ; *Lazarus v. Andrade* (1880), 5 C. P. Div. 318 ; 49 L. J. 847, C. P.

described as above, the assignment would be valid at law as well as in equity.(a) However, notwithstanding the Judicature Acts, the grant of future-acquired chattels confers only an equitable interest therein upon the grantee, and if when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's equitable interest, become vested in another person for value, the latter's title to the future-acquired chattels prevails both at law and in equity.(b).

What has been stated above as to the effect of an assignment of after-acquired chattels is still applicable to an absolute bill of sale.(c)

As to bills of sale coming within the operation of the Act of 1882, that is, bills given by way of security for money, the law, subject to certain excepted chattels, stands on a different footing. The Act enacts that not only must a bill of sale given by way of security for money be in accordance with the form given in the schedule to the Act (sect. 9), but must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised therein; and such bill of sale, save as presently to be mentioned, has effect only in respect of the personal chattels specifically described in the schedule; and, except as against the grantor, is to be void in respect of any personal chattels not so specifically described (sect. 4).

Further, save as mentioned *infra*, a bill of sale is to be void, except as against the grantor, in respect of personal chattels which are specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale (sect. 5).

The following things are excepted from the above sections, and may be included in the bill:

(1.) Growing crops separately assigned or charged, if actually growing at the time of the execution of the bill of sale.

(2.) Fixtures separately assigned or charged, and any plant, or trade machinery, where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to the bill of sale (sect. 6).

It has been held, however, that notwithstanding sects. 4, 5, and 6, a bill of sale which purports to assign chattels specifically described, "and all chattels which at any time during the continuance of the security may be in or about the premises, and whether brought there in substitution for, renewal of, or in addition to the chattels assigned by way of security for the payment of the" consideration money, is *altogether* void, as not in accordance with the form in the schedule to the Act as

(a) *Lazarus v. Andrade*, *sup.*

(b) *Joseph v. Lyons*, 15 Q. B. Div. 280; 54 L. J. 864, Q. B. 1; 51 L. T. Rep. N. S. 740.

(c) 1 Frid. Conv. 750, 16th edit.; Baldw. Bk. 301, 7th edit.

required by sect. 9.(a) It will be seen, therefore, how difficult it must be to assign after-acquired property by a bill of sale coming within the provisions of the Act of 1882, except as against the grantor, and save as to the excepted chattels.

However, an assignment of book debts, including future debts of the assignor, is good, and does not come within the operation of the Bills of Sale Acts.(b)

"Growing crops separately assigned," &c., excepted by sub-sect. 1 of sect. 6, means apart from any interest in the land on which they grow.(c) And although household furniture is not within the terms of sub-sect. 2 of sect. 6, yet a bill of sale thereof, which contains a covenant (in effect) to repair and to "replace any articles damaged or worn out with others," &c., is valid, and is to be distinguished from the case of *Thomas v. Kelley*, above referred to.(d) But horses included in a bill of sale, which are sold, and other horses substituted, are not "plant" within the meaning of the sub-section.(e)

The "true owner," within sect. 5 (*supra*), includes the person who is the true legal owner at the date of the execution of the bill of sale, irrespective of the question whether he is also the equitable owner or only a trustee.(f)

A person who has given a prior absolute bill of sale, which is not void, is not the true owner of the goods assigned within sect. 5, and consequently any second bill is void, except as against himself (g); but it is otherwise if the first bill of sale be by way of mortgage only, for in that case the grantor has still an equity of redemption in him, which he can assign.(h)

Personal chattels referred to in sect. 5, not coming within the exception in sect. 6, of which the grantor may not be the true owner must be chattels actually in existence.(i)

Requisites as to Execution and Attestation of a Bill of Sale under the Act, 1878.

As already stated, the Bills of Sale Act, 1878, applies to all bills of sale, absolute or by way of security executed on or after 1st January,

(a) *Thomas v. Kelley*, 13 App. Cas. 506; 37 W. R. 353; 58 L. J. 66, Q. B.; 60 L. T. Rep. N. S. 114.

(b) *Tailby v. Official Receiver*, 13 App. Cas. 523; 58 L. J. 75, Q. B.; 60 L. T. Rep. N. S. 162; 37 W. R. 513.

(c) *Roberts v. Roberts*, 13 Q. B. Div. 794; 53 L. J. 313, Q. B.; 50 L. T. Rep. N. S. 351; 32 W. R. 605, C. A.

(d) *Seed v. Bradley* (1894), 1 Q. B. 319; 63 L. J. 337, Q. B.; 70 L. T. Rep. N. S. 214; 42 W. R. 257.

(e) *London, &c., Discount Co. v. Creasy*, 66 L. J. 503, Q. B.; (1897) 1 Q. B. 768; 76 L. T. Rep. N. S. 612.

(f) *Es parte Williams, Re Sarle* (1892), 2 Q. B. 591; 67 L. T. Rep. N. S. 597.

(g) *Tuck v. Southern Counties Bank*, 42 Ch. Div. 471; 58 L. J. 699, Ch.; 61 L. T. Rep. N. S. 348; 37 W. R. 769.

(h) *Thomas v. Searle* (1891), 2 Q. B. 408; 60 L. J. 722, Q. B.; 65 L. T. Rep. N. S. 39; 39 W. R. 692.

(i) Per Lord Macnaghten, in *Thomas v. Kelley*, *supra*, at p. 521.

1879, and registered before 1st November, 1882, and also to all absolute bills of sale executed since the latter date.(a)

By the Bills of Sale Act, 1878, s. 8 (repealed to the effect stated *post*), every bill of sale must be duly attested, and registered under the Act within seven days after the making thereof, and must set forth the consideration for which it was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels are comprised therein under the law of bankruptcy or liquidation, or under an assignment for the benefit of his creditors, and as against all sheriffs' officers, seizing any chattels comprised in such bill of sale in the execution of any process of any court, &c., and as against the execution creditor, is to be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of the assignment, or process, and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale, or of the person against whom the process has issued, &c. (sect. 8).

As to execution, sub-sect. 1 of sect. 10 of the Act of 1878 required the execution of the bill of sale to be attested by a solicitor, and that the attestation should state that before the execution the effect of the bill had been explained to the grantor by the attesting solicitor.

It will be noticed that sect. 8 of the Act of 1878 enacts that if the bill of sale be not duly attested and registered, &c., it is void as against the persons mentioned in the section of whom the grantor of the bill is not one. And the Act is to be read as if sect. 8 included sect. 10; therefore, the bill of sale, though not attested as required by the Act, is still good as between grantor and grantee.(b)

The grantee of the bill of sale, who is himself a solicitor, cannot attest the bill.(c) But it was held that a solicitor acting for the grantee may attest it.(d) And a solicitor who is not in practice for himself, but only a managing clerk, may attest the bill.(e)

By the Bills of Sale Act, 1882, sect. 8 of the Act of 1878 is repealed (sect. 15); also so much of sect. 10 of the latter Act as requires the execution of the bill to be attested by a solicitor, &c. (sect. 10); but it has been held that this repeal only applies to bills of sale given by way of security for money, and not to absolute bills of sale.(f)

Absolute bills of sale are not very common, but we might instance a post nuptial settlement of chattels not made in pursuance of articles

(a) See *ante*, pp. 250, 251.

(b) *Davis v. Goodman*, 5 C. P. Div. 128; 49 L. J. 344, C. P.; 42 L. T. Rep. N. S. 288; 28 W. R. 559, C. A.

(c) *Seal v. Claridge*, 7 Q. B. Div. 516; 50 L. J. 316, Q. B.; 44 L. T. Rep. N. S. 501; 29 W. R. 598.

(d) *Penwarden v. Roberts*, 9 Q. B. Div. 137; 51 L. J. 312, Q. B.

(e) *Hill v. Kirkwood*, 42 L. T. Rep. N. S. 105; 28 W. R. 358.

(f) *Swift v. Pannell*, 24 Ch. Div. 210; 53 L. J. 341, Ch.; 48 L. T. Rep. N. S. 351; 31 W. R. 543; *Casson v. Churchley*, 53 L. J. 335, Q. B.; 50 L. T. Rep. N. S. 568.

executed before marriage, which must be attested as required by the Act of 1878, and be registered.(a)

The mode of registration of bills of sale will be explained in subsequent pages.

Requisites as to the Form, Execution, and Attestation of a Bill of Sale under the Act, 1882.

Form of Bill.—By the Bills of Sale Act, 1882, s. 12, every bill of sale made in consideration of any sum under 30*l.* is to be void. And it seems that a bill of sale purporting to be in consideration of 30*l.*, a part of which is to be repayable on demand(b), which is demanded immediately after the execution of the bill, is no longer good, as not being an agreement to pay at a stipulated time, in accordance with the form of a bill of sale in the schedule to the Act of 1882.(c)

And by sect. 9 of the Act, a bill of sale given by way of security for the payment of money by the grantor is void unless in accordance with the form given in the schedule to the Act (sect. 9). But a mortgage of land and of chattels by the same instrument, not in accordance with such form, may be good as to the land and bad as to the chattels, if it is possible to sever the security upon the personal chattels from that upon the other property.(d) The same rule applies when chattels are mortgaged, and by the same deed certain contractual rights respecting the chattels are assigned; the deed may be bad as to the chattels and good as to the contractual rights; as where a piano was mortgaged and a hiring agreement respecting it was also assigned to the grantee.(e)

And though an attornment clause may be void within the Bills of Sale Act, 1878, s. 6, so far as it purports to confer a power of distress as a security over chattels, yet it does not affect the operation of the clause so far as it creates the relationship of landlord and tenant between mortgagee and mortgagor.(f)

A bill of sale is "in accordance" with the prescribed form in the schedule to the Act of 1882 if it does not depart from it in any material respect.(g) But it is not in accordance with the form if it departs from it in anything which is a characteristic of that form.(h) A great many

(a) See *Ashton v. Blackshaw*, L. R. 9, Eq. 510; 39 L. J. 205, Ch.; *et ante*, p. 250).

(b) See *Davis v. Usher*, 12 Q. B. Div. 490.

(c) *Hetherington v. Groome*, 13 Q. B. Div. 789; 53 L. J. 576, Q. B.; 51 L. T. Rep. N. S. 412; 33 W. R. 103, C. A.

(d) *Re Burdett*; *Ex parte Byrne*, 20 Q. B. 310; 57 L. J. 263, Q. B.; 58 L. T. Rep. N. S. 708; 36 W. R. 345, C. A.; *et ante*, p. 252.

(e) *Re Isaacson*; *Ex parte Mason* (1895), 1 Q. B. 333; 64 L. J. 191, Q. B.; 71 L. T. Rep. N. S. 812; 43 W. R. 278.

(f) *Mumford v. Collier*, 25 Q. B. Div. 279; 59 L. J. 552, Q. B.; 38 W. R. 716; *et ante*, p. 208.

(g) *Ex parte Stanford*; *Re Barber*, 17 Q. B. Div. 259, 270; 55 L. J. 841, Q. B.; 54 L. T. Rep. N. S. 894; 34 W. R. 507.

(h) Per Lord Macnaghten in *Thomas v. Kelley*, 13 A. C. at p. 520.

decisions have been given as to what stipulations contained in a bill of sale are good and what are bad. We will first state some of the most important of those which have been held good.

(1.) The bill may contain recitals if they neither add to nor detract from the legal effect of the bill of sale, and are not misleading.(a) A bill of sale which provides for payment of the mortgage debt, with interest, in one sum at a given time from the date of the deed is good.(b) So is one which provides that in the event of failure to pay any one instalment of principal and interest the whole of the principal unpaid and interest then due shall be at once payable.(c) So the bill may stipulate that the amount of the principal sum be repaid by unequal instalments.(d)

The omission of the words from the bill "by way of security" is not a fatal defect if the construction of the document is otherwise plain.(e)

A bill which grants the chattels to a person in a trade name is sufficient.(f)

A bill containing a covenant to repair and replace any articles damaged or worn out with others of equal value is valid, as being for the maintenance of the security. For the expression "necessary for the maintenance of the security" in the Act of 1882 means maintenance of the security created by the bill of sale, which is only complied with when the subject of the charge and the grantee's title to it are preserved in as good plight and condition as at the date of the bill of sale.(g).

A covenant by the grantor to insure and produce the receipts for premiums is one necessary for the maintenance of the security.(h)

And a covenant that the grantee may, on default by the grantor, pay the insurance of the goods and the rent, rates, and taxes of the premises in which the goods might be, such payments with interest to be a charge upon the goods assigned, is permissible.(i)

A covenant not to remove the goods granted by the bill without the

(a) *Ex parte Stanford*; *Re Barber*, sup.

(b) *Watkins v. Evans*, 18 Q. B. Div. 386; 56 L. J. 200, Q. B.; 56 L. T. Rep. N. S. 177; 35 W. R. 313.

(c) *Lumley v. Simmons*, 34 Ch. Div. 698; 56 L. J. 329, Ch.; 56 L. T. Rep. N. S. 134; 35 W. R. 422.

(d) *Re Cleaver*; *Ex parte Rawlings*, 18 Q. B. Div. 489; 56 L. J. 197, Q. B.; 35 W. R. 281; 56 L. T. Rep. N. S. 593.

(e) *Roberts v. Roberts*, 13 Q. B. Div. 794; 53 L. J. 313, Q. B.

(f) *Simmons v. Woodward* (1892), A. C. 100; 61 L. J. 252, Ch.; 66 L. T. Rep. N. S. 534; 40 W. R. 641.

(g) *Furber v. Cobb*, 18 Q. B. Div. 494; 56 L. J. 273, Q. B.; 56 L. T. Rep. N. S. 689; 35 W. R. 398; *Seed v. Bradley* (1894), 1 Q. B. 319; 63 L. J. 337, Q. B.

(h) *Watkins v. Evans*, 18 Q. B. Div. 386; 56 L. J. 200, Q. B.; *Hammond v. Hocking*, 12 Q. B. Div. 291; 53 L. J. 205, Q. B.; 50 L. T. Rep. N. S. 267.

(i) *Ex parte Stanford*; *Re Barber*, 17 Q. B. Div. 259, *et ante*, p. 256; *Goldstrom v. Tallerman*, 18 Q. B. Div. 1; 56 L. J. 22, Q. B.; 55 L. T. Rep. N. S. 866; 35 W. R. 68.

consent of the grantee is good.(a) And a covenant in the ordinary form for further assurance is also permissible.(b)

(2.) We will now mention some of the most important of the cases where the bill of sale has been held not to be in accordance with the statutory form.

The omission of the address of the grantee from a bill of sale given by way of security for money renders the bill void under sect. 9 of the Act of 1882, as not being made in accordance with the form in the schedule to the Act.(c)

A provision for payment of the principal money on demand is inconsistent with the form which contemplates a stipulated time of payment.(d)

A bill of sale (even if given by way of indemnity to a surety for payment of money) is bad if it does not fix a definite sum to be paid.(e) And a bill of sale which provides for the payment of a sum by way of capitalised interest is void(f); also one which does not state a rate of interest.(g)

If the grantor purports to assign the chattels "as beneficial owner," the bill is not in accordance with the statutory form, as these words would incorporate the covenant implied by sect. 7 (C) of the Conveyancing Act, 1881, and thereby give the bill a wider effect than that given by the statutory form; for, on default, the grantee would have a power of entry, and impliedly a power of forthwith removing and selling the goods.(h)

A provision that on a sale the purchaser shall not be bound to see or enquire whether any default has been made is bad as not being one for the maintenance of the security, and adversely affects the rights of the grantor as given by sect. 7 of the Act of 1882.(i)

It should be noticed that where the bill of sale is void because it is not in accordance with the statutory form, it is void in toto, and not merely as to the chattels comprised therein, so that the covenant for payment of the debt contained in it is void against the grantor. However, the debt is not gone, for there is an implied agreement to repay the money lent independently of the bill of sale(k); and as we shall show shortly, where the bill is void for not truly setting forth the consideration, the covenant for repayment remains.

Seizure of Chattels.—To prevent a power to seize being harshly

(a) *Furber v. Cobb*, sup. (b) *Re Cleaver*; *Ex parte Rawlings*, sup.

(c) *Altree v. Altree* (1898), 2 Q. B. 267; 78 L. T. Rep. N. S. 794; 67 L. J. 882, Q. B.

(d) *Ante*, p. 256.

(e) *Hughes v. Little*, 18 Q. B. Div. 32; 56 L. J. 96, Q. B.; 55 L. T. Rep. N. S. 476; 35 W. R. 36.

(f) *Davis v. Burton*, 11 Q. B. Div. 537; 52 L. J. 636, Q. B.; 32 W. R. 423.

(g) *Myers v. Elliott*, 16 Q. B. Div. 526; 54 L. T. Rep. N. S. 555; *Blankenstein v. Robertson*, 24 Q. B. Div. 543; 62 L. T. Rep. N. S. 732; 59 L. J. 315, Q. B.

(h) *Ex parte Stanford*; *Re Barber*, 17 Q. B. Div. 259; 55 L. J. 341, Q. B.; 54 L. T. Rep. N. S. 894; 34 W. R. 507.

(i) *Blaiberg v. Beckett*, 18 Q. B. Div. 96; 56 L. J. 35, Q. B.; 55 L. T. Rep. N. S. 876; 35 W. R. 34.

(k) *Davies v. Rees*, 17 Q. B. Div. 408; 55 L. J. 363, Q. B.; 54 L. T. Rep. N. S. 818; 34 W. R. 578.

exercised, the 45 & 46 Vict. c. 43, s. 7, provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes: (1) if the grantor makes default in payment of the sum or sums thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained therein and necessary for maintaining the security; or (2) if the grantor becomes a bankrupt, or suffers the said goods or any of them to be distrained for rent, rates, or taxes; or (3) fraudulently removes or suffers them, or any of them, to be removed from the premises; or (4) if he does not without reasonable excuse, upon written demand by the grantee, produce his last receipts for rent, rates, and taxes; or (5) if execution has been levied against the grantor's goods under a judgment at law.

The grantor may, however, within five days from any such seizure or possession, apply to the High Court or to a judge at chambers, and such court or judge, if satisfied that by payment or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just (sect. 7). And by sect. 13 chattels seized or taken possession of under a registered bill of sale must remain on the premises where they were seized or taken possession of, and must not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of.

The cases bearing on sub-sect. 1 of sect. 7 as to default in payment, and the covenants necessary for maintaining the security, have already been stated.

A power of forcible entry, by breaking open doors, &c., may be added to the statutory power of seizure.(a)

Whether the power of sale given to mortgagees by sect. 19 of the Conveyancing Act, 1881, applies to bills of sale within the Bills of Sale Act, 1882, is subject to conflicting decisions. However, a mortgagee of personal chattels of which he has taken possession, has, without any express power in the mortgage deed, upon default in payment of the mortgage money and after reasonable notice to the mortgagor, power to sell the chattels (b), subject to the provisions in sect. 7 of the latter Act.

A clause providing that the mortgagee may, in addition to his principal and interest, retain out of the proceeds of the sale the costs, properly incurred, of entry, seizure, possession, removal, valuation and sale, may be contained in the bill; and such a trust is implied if not expressly given(c) But if to an express power of seizure and sale is added a proviso that the

(a) *Lumley v. Simmons*, 34 Ch. Div. 698; 56 L. J. 329, Ch.; 35 W. R. 422; *Ex parte Official Receiver*; *Re Morritt*; 18 Q. B. Div. 222; 56 L. J. 139, Q. B.; 56 L. T. Rep. N. S. 42; 35 W. R. 277.

(b) *Ex parte Official Receiver*; *Re Morritt*; sup.; *Watkins v. Evans*, 18 Q. B. Div. 386; 56 L. J. 200, Q. B.; 56 L. T. Rep. N. S. 177; 35 W. R. 313; *Calvert v. Thomas*, 19 Q. B. Div. 204; 56 L. J. 470, Q. B.; 57 L. T. Rep. N. S. 441; 35 W. R. 616.

(c) *Ex parte Rawlings*; *Re Cleaver*, 18 Q. B. Div. 489; 56 L. J. 197, Q. B.; 35 W. R. 281; 56 L. T. Rep. N. S. 593; *Lumley v. Simmons*, sup.

mortgagee may, out of the moneys to arise from the sale, pay "the expenses attending such sale, or otherwise incurred in relation to the security," the bill is void, as the power is too wide, for it might include expenses incurred before the execution of the bill, if they related in any way to the security.(a)

A power given to the grantee to have the goods valued, and to purchase them at such valuation, is bad as not being necessary for the maintenance of the security.(b)

The words in sect. 7 (2) are if the grantor "becomes a bankrupt," &c.; and it has been held that no right to seize can be given by a clause stating that if he "do or suffer anything whereby he shall render himself liable to become bankrupt."(c) And no right to seize can be given "if the grantor shall take the benefit of any Bankruptcy Act," for these words will include a composition effected under the Bankruptcy Act, 1883, and is therefore a larger power than that conferred by the Bills of Sale Act, 1882.(d)

The bill of sale should not provide for seizure of the goods for any cause not specified by the Act, even with a proviso that they shall not be liable to be seized for any cause other than those specified in sect. 7, or it may render the bill void.(e)

As to sub-sect. 4 of sect. 7, as to production of receipts, it is a reasonable excuse for not producing the last receipt for rent if the landlord has not demanded the rent, such rent having been due only a few days.(f) And as the section requires the demand to be in writing, it cannot be stipulated in the bill of sale that the seizure may be after a demand "in writing or otherwise," as that would enable the grantee to seize after a verbal demand.(g) But the mere omission of the words "upon demand in writing" from a covenant by the grantor to produce his last receipt for rent, &c., is immaterial if the chattels assigned are only to be seized for the causes mentioned in sect. 7.(h)

Where the bill of sale provides for payment of the sum advanced by instalments, seizure may, after written demand, be made on default of

(a) *Calvert v. Thomas*, sup. p. 259.

(b) *Lyon v. Morris*, 19 Q. B. Div. 139; 56 L. J. 378, Q. B.; 56 L. T. Rep. N. S. 915; 57 *Id.* 324; 35 W. R. 707.

(c) *Re Williams; Ex parte Pearce*, 25 Ch. Div. 656; 53 L. J. 500, Ch.; 49 L. T. Rep. N. S. 475; 32 W. R. 187.

(d) *Gilroy v. Bowey*, 59 L. T. Rep. N. S. 223.

(e) See and compare *Re Williams*, sup.; *Furber v. Cobb*, 18 Q. B. Div. 494; 56 L. J. 273, Q. B.; 35 W. R. 398; *Real, &c., Co. v. Clears*, 20 Q. B. Div. 304; 57 L. J. 164, Q. B.; *Re Paxton*, 60 L. T. Rep. N. S. 428; *Briggs v. Pike*, 61 L. J. 418, Q. B.; 66 L. T. Rep. N. S. 637; *Re Bullock*, 68 L. J. 953, Q. B.; (1899) 2 Q. B. 517.

(f) *Ex parte Cotton*, 11 Q. B. Div. 301; 49 L. T. Rep. N. S. 52; 32 W. R. 58; *Ex parte Wickens*, 67 L. J. 397, Ch.; 78 L. T. Rep. N. S. 213; (1898) 1 Q. B. 543.

(g) *Davis v. Burlon*, 11 Q. B. Div. 537; 52 L. J. 636, Q. B.; 48 L. T. Rep. N. S. 433; *Barr v. Kingsford*, 56 L. T. Rep. N. S. 861.

(h) *Carlwright v. Regan* (1895), 1 Q. B. 900; 64 L. J. 507, Q. B.; 43 W. R. 600.

payment of the first instalment.(a) Where a bill of sale provided for payment of a fixed sum per month for interest, and on default being made the grantee authorised the bailiff to seize and hold possession of the chattels assigned until such interest was paid, it was held that the Court had no jurisdiction under sect. 7 to order the bill of sale to be delivered up on payment of principal and interest to date and costs.(b) But the Court can do so if the seizure is made for the purpose of realising the security, that is, selling the goods.(c)

Sect. 7 of the Act of 1882 applies to goods seized after the operation of the Act under a bill of sale executed and registered before the Act operated.(d)

As already stated, by sect. 13 of the Act of 1882, the chattels are not to be removed or sold for five days after seizure. As this section is for the protection of the grantor, he may consent to their removal by the grantee before the expiration of the five days, and so defeat the landlord's right to distrain the goods for rent, and as the chattels are the property of the grantee, no right of action lies against him by the landlord under 11 Geo. 2, c. 19, s. 3, for double value.(e)

Even after the five days have expired the grantor may, if the goods have not been sold, bring an action for their redemption on payment of principal, interest and costs, but he cannot sue in trespass for the removal of the goods.(f)

It has already been stated that under the proviso to sect. 7 of the Act of 1882 the grantor may within the five days apply to the Court or a judge to stay the sale, who may do so, or make such other order as may be just. And by R. S. Court, Ord. 57, r. 12, where goods have been seized in execution by the sheriff, and a claimant alleges that he is entitled to the goods under a mortgage bill of sale, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds thereof in such manner and upon such terms as may be just.(g)

Of Attestation, Consideration and Registration.

We have already pointed out how a bill of sale should be attested under the Bills of Sale Act of 1878 (h); and we will now state the requisites of the Act of 1882 in regard to attestation, and the requisites of both those Acts as to consideration and registration.

(a) *Es parte Woolf; Re Wood* (1894), 1 Q. B. 605; 63 L. J. 352, Q. B.; 70 L. T. Rep. N. S. 282.

(b) *Es parte Ellis*, 67 L. J. 734; (1898) 2 Q. B. 79; 78 L. T. Rep. N. S. 733; 46 W. R. 531.

(c) *Es parte Wickens*, sup.

(d) *Es parte Cotton*, sup.

(e) *Tomlinson v. Consolidated Credit Co.*, 24 Q. B. Div. 135; 33 W. R. 118; 62 L. T. Rep. N. S. 162, C. A.

(f) *Johnson v. Diprose* (1893), 1 Q. B. 512; 62 L. J. 291, Q. B.; 68 L. T. Rep. N. S. 485; 41 W. R. 371.

(g) See hereon *Forster v. Clowser; Diprose, Claimant* (1897) 2 Q. B. 362.

(h) *Ante*, p. 255.

Sect. 8 of the Act of 1882 requires every bill of sale to be (1) duly attested, and (2) to be registered under the Act of 1878 within the time to be presently noticed, and (3) to truly set forth the consideration for which it was given, otherwise the bill of sale is to be *void* in respect of the *personal chattels* comprised therein (sect. 8). It will be remembered that sect. 8 of the Act of 1878 avoids the bill if not duly attested and registered, and does not set forth the consideration against certain persons, of whom the grantor is not one. And on the construction of the latter Act it was held that the bill of sale, though not registered and attested, was good as between grantor and grantee.(a)

Attestation.—By sect. 10 of the Act of 1882, the execution of every bill of sale by the grantor must be attested by one or more credible witness or witnesses, not being a party or parties thereto. And so much of sect. 10 of the Act of 1878 (b) as requires that the execution of every bill of sale shall be attested by a solicitor, and that the attestation shall state that before execution he explained the effect thereof to the grantor, is repealed (sect. 10). But as already stated, this repeal has been held to apply only to bills of sale given by way of security for money, and not to absolute bills of sale.(c)

A mortgage bill of sale may be executed by attorney, and the grantee is not necessarily precluded from being such attorney.(d) So the agent of the grantee may be the attesting witness.(e) The address and description of every attesting witness to a mortgage bill of sale must be stated in the attestation clause thereto, otherwise the bill will be void; and the defect is not cured by the fact that the address and description appear in the affidavit filed.(f) If a witness has no occupation it should be so stated, otherwise a bill given under the Act of 1882 will be void, as not being made in accordance with that Act.(g) But if the same witness attests the signatures of two grantors, and separate attestation clauses are used, it is not necessary that the witness should add his address and description in both attestation clauses.(h) The business address of the witness will be sufficient if he can be found there.(i)

The Consideration.—The Bills of Sale Act, 1878, s. 8, requires the bill to set forth the consideration for which it is given, otherwise the bill is to be void against trustees of the grantor in bankruptcy, or under an assignment for the benefit of creditors, &c., so far as regards the chattels comprised therein. This section is repealed by sect. 15 of the

(a) *Ante*, p. 255.

(b) *Ante*, p. 255.

(c) *Ante*, p. 255.

(d) *Furnival v. Hudson* (1893), 1 Ch. 335; 62 L. J. 178, Ch.; 68 L. T. Rep. N. S. 378; 41 W. R. 358.

(e) *Peace v. Brooks*, 64 L. J. 747, Q. B.; (1895) 2 Q. B. 451.

(f) *Parsons v. Brand*, 25 Q. B. 110; 59 L. J. 189, Q. B.; 62 L. T. Rep. N. S. 479; 38 W. R. 388.

(g) *Sims v. Trollope* (1897), 1 Q. B. 24; 66 L. J. 11, Q. B.; 75 L. T. Rep. N. S. 351; 45 W. R. 97, C. A.

(h) *Bird v. Davey* (1891), 1 Q. B. 29; 60 L. J. 8, Q. B.; 39 W. R. 40.

(i) *Simmons v. Woodward* (1892), A. C. 100; 61 L. J. 252, Ch.; 40 W. R. 641; 66 L. T. Rep. N. S. 534.

Bills of Sale Act, 1882, so far as it relates to bills of sale given by way of security for money.(a) But sect. 8 of the latter Act requires the bill to *truly* set forth the consideration for which it is given, otherwise the bill is to be void in respect of the personal chattels comprised therein (sect. 8). The bill, it will be noticed, is only to be void as to the chattels comprised in it; and as an untrue statement as to the consideration does not constitute a deviation from the statutory form, the covenant to repay the mortgage money remains good.(b) But the bill must otherwise be in accordance with the statutory form; for if not the covenant for payment of principal and interest is void against the grantor. However, there is an implied agreement to repay the money lent independently of the bill of sale. The Act did not intend that the borrower should keep the money because the bill of sale is void.(c)

In a recent case under the Act of 1882, ss. 8, 12, where the consideration purported to be made up as follows: 13*l.* 12*s.* then due on a promissory note given by the grantor to the grantee, and 16*l.* 8*s.* then paid to the grantor making 30*l.*, but in reality the consideration for the promissory note was only 10*l.*, and therefore the whole amount received by the grantor was only 26*l.* 8*s.*, the bill of sale was held to be void.(d)

And in a case under the Act of 1878 it was held that if the true consideration be not set out in the bill itself, the defect is not cured by the true consideration appearing in a receipt at the foot of the bill; for such a receipt forms no part of the deed; thus, where the consideration was stated in the bill to be 120*l.*, but 30*l.* was in fact deducted for interest and expenses, and only 90*l.* paid, the bill was held void against a trustee in liquidation, although the receipt at the foot showed the real facts.(e)

In another case, under the Act of 1878, s. 8, it was held, however, that the consideration for a bill of sale is sufficiently stated so as to satisfy the requirements of the Act if it is stated with substantial accuracy—if the true legal or business effect of what actually took place is stated.(f)

In a bill of sale by way of mortgage under the Act, 1878, a sum of money was retained by the grantor for expenses incident to the preparation of the bill of sale, and the balance only was paid over to the grantor, and it was held that the consideration was not truly stated.(g) And if by

(a) See *ante*, pp. 251, 255.

(b) *Heseltine v. Simmons* (1892), 2 Q. B. 547; 62 L. J. 5, Q. B.; 41 W. R. 67; 67 L. T. Rep. N. S. 611.

(c) *Davies v. Rees*, 17 Q. B. Div. 408; 55 L. J. 363, Q. B.; 54 L. T. Rep. N. S. 813; 34 W. R. 573; *Heseltine v. Simmons*, *sup.*

(d) *Darlow v. Bland* (1897), 1 Q. B. 125; 66 L. J. 157, Q. B.; 75 L. T. Rep. 537.

(e) *Ex parte Charing Cross, &c., Bank*; *Re Parker*, 16 Ch. Div. 35; 50 L. J. 157, Ch.; 44 L. T. Rep. N. S. 113; 29 W. R. 204.

(f) *Ex parte Johnson*; *Re Chapman*, 26 Ch. Div. 338; 53 L. J. 762, Ch.; 50 L. T. Rep. N. S. 214; 32 W. R. 693.

(g) *Ex parte Firth*; *Re Cowburn*, 19 Ch. Div. 419; 51 L. J. 473, Ch.; 46 L. T. Rep. N. S. 120; 30 W. R. 529; explaining *Ex parte National Mercantile Bank*; *Re Haynes*, 15 Ch. Div. 42; 49 L. J. 62, Bk.; but see *Ex parte Hunt*; *Re Cann*, 13 Q. B. Div. 36.

agreement with the grantor any part of the consideration money is not paid to the grantor, but retained by the grantee, this fact must be stated in the bill of sale, or it will be void.(a)

However, it seems that if no consideration at all passes at the time of the execution of the bill of sale, but is a debt owing by the grantor to the grantee, the fact need not be stated in the deed. Thus, where the consideration for the bill was expressed to be 2000*l.* paid by the grantee to the grantor before execution, which, however, in reality was not paid, but was the unpaid balance of the purchase money of a brewery assigned by the grantee to the grantor; it was held, under the Act of 1878, that the consideration was properly stated.(b)

So where a bill of sale under the Act of 1878, recited that it was given to secure 7350*l.* "now" paid by the grantee to the grantor, whereas in fact the sum was only the balance found to be due on accounts stated between them, and no money actually passed, yet the consideration was held to be truly set forth.(c)

Money lent by several persons in unequal shares may be stated in the bill as lent by one of them, who is acting as collector for the others.(d)

Registration.—We now come to the provisions of the Bills of Sale Acts, 1878 and 1882, which prescribe the time and mode of registration of all bills of sale.

By sect. 8 of the Act of 1882, every bill of sale must be registered under the Act of 1878, within seven clear days after its execution, or if executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and must truly set forth the consideration for which it was given, otherwise the bill is to be void in respect of the personal chattels comprised therein (sect. 8). We have already pointed out the difference in the effect of non-registration under this Act and the Act of 1878.(e)

By sect. 10, sub-sect. 2, of the Act of 1878 (as amended by sect. 8 of the Act 1882, stated *sup.*), (1) the bill of sale with every schedule or inventory thereto annexed or therein referred to, and (2) also a true copy of such bill and of every schedule or inventory, and of every attestation of the execution of the bill, together (3) with an affidavit of the time the bill was made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving it (or if made or given by a person while under or in the execution of process, then a description of the residence and occupation of

(a) *Ex parte Charing Cross Bank*; *Re Parker*, *sup.*; *Richardson v. Harris*, 22 Q. B. Div. 268; 37 W. R. 426.

(b) *Ex parte Bolland*; *Re Roper*, 21 Ch. Div. 543; 47 L. T. Rep. N. S. 488; 52 L. J. 113, Ch.; 31 W. R. 102; see also *Ex parte Johnson*; *Re Chapman*, *ante*, p. 263.

(c) *Credit Company v. Pott*, 6 Q. B. Div. 295; 50 L. J. 106, Ex.; 44 L. T. Rep. N. S. 506; 29 W. R. 326; and see *Re Wiltshire*; *Ex parte Eynon* (1900), 1 Q. B. 96; but see *Ex parte Berwick*; *Re Young*, 43 L. T. Rep. N. S. 576; 29 W. R. 292.

(d) *Ex parte Torbuck*; *Re Smith*, 72 L. T. Rep. N. S. 59; 43 W. R. 206.

(e) *Ante*, p. 262.

the person against whom process issued), and of every attesting witness to the bill, must be presented to, and the said copy and affidavit filed with the registrar within the time above mentioned, in like manner as a warrant of attorney is to be filed.

The description of the grantor and the attesting witnesses must be reasonably sufficient and true, and not calculated to deceive. Thus where in the bill of sale the grantor was described as of "No. 37, Malpas Road, Deptford," and the attesting witness as "G. W., 2, South Terrace, Hatcham Park Road," and in the affidavit filed with it the deponent stated that the grantor resided at "No. 73, Malpas Road, Deptford," and that he himself resided at "3, South Terrace, Hatcham Park Road," it was held that the misstatement of the numbers, one contradicting the other, was fatal.(a) But if the description of the grantor be correct, untrue additional words will not invalidate the bill, if mere surplusage and not calculated to mislead.(b) A slight error in the name of the grantor, or of the county, stated in the bill, will not invalidate it, if the grantee is not deceived thereby.(c)

The definition of "occupation" is the business or calling that a man follows. Therefore, where the grantor of the bill was a clerk in the Audit Office, and was described as "gentleman," it was held to be a misdescription.(d) And where the attesting witness was described as "gentleman," but was at the time acting as a solicitor's clerk—though formerly himself a solicitor—it was held to be a misdescription.(e) The residence to be described is the place where the person is most likely to be found, which may be his own place of business or that of his employer.(f)

The description of the residence of the maker of the bill of sale to be stated in the affidavit filed therewith must be his residence at the time of swearing the affidavit, and not at the time of executing the bill of sale.(g) But where the grantor was described in the affidavit in the same manner as in the bill of sale, it was held sufficient, though at the time of making the affidavit the grantor had left his residence and gone to America.(h)

Where an attesting witness has no occupation, and omits to state that fact, or to give his "style" or addition, the omission renders the bill of

(a) *Murray v. Mackenzie*, L. R. 10 C. P. 625; 32 L. T. Rep. N. S. 777; 23 W. R. 595.

(b) *Es parte Popplewell*; *Re Storey*, 21 Ch. Div. 73; 52 L. J. 39, Ch.; 47 L. T. Rep. N. S. 274; 31 W. R. 35.

(c) *Es parte M'Hattie*; *Re Wood*, 10 Ch. Div. 398; 48 L. J. 26, Bk.; *Downs v. Salmon*, 20 Q. B. Div. 775; 57 L. J. 454, Q. B.

(d) *Allen v. Thompson*, 25 L. J. 249, Ex.

(e) *Tutton v. Sanoner*, 27 L. J. 293, Ex.; 6 W. R. 545; but see *Smith v. Cheese*, 1 C. P. Div. 60; 45 L. J. 156, C. P.

(f) *Simmons v. Woodward* (1892) A. C. 100; 61 L. J. 252, Ch.; 66 L. T. Rep. N. S. 534; *Dolcini v. Dolcini* (1895) 1 Q. B. 898; 64 L. J. 427, Q. B.; 43 W. R. 542.

(g) *Button v. O'Neil*, 4 C. P. Div. 354; 48 L. J. 368, C. P.; 40 L. T. Rep. N. S. 799; 27 W. R. 592.

(h) *Es parte Kahen*, *Re Heiter*, 21 Ch. Div. 871; 51 L. J. 904, Ch.; 46 L. T. Rep. N. S. 856; 30 W. R. 954.

sale void, as "description" in the form given by the Act of 1862 means more than occupation.(a)

The omission of the date of a bill of sale in the *copy* filed upon registration (*ante*, p. 264) does not necessarily render the bill of sale void, for the affidavit filed with the copy may be looked at to supply the omission.(b)

As to the affidavit, although it may be sufficient if it states the bill of sale to be made between the parties residing at the places, and to be of the occupations therein mentioned(c), yet the omission from the description in the affidavit of the grantor's occupation was held to render the bill void.(d) In a later case, however, a reference made in the affidavit to the description in the bill was held to supplement the imperfect description in the affidavit.(e) But where the description in the affidavit differs from that in the bill of sale and is erroneous, the defect is fatal.(f)

In addition to verifying the signature of the attesting witness, and describing his residence and occupation, the affidavit must show that the bill was duly attested, that is, show that the witness was present and witnessed its execution by the grantor.(g)

When the affidavit is sworn before a commissioner and the jurat is signed by him, it is sufficient, although it does not state that the person signing the jurat is a commissioner.(h)

In *Vernon v. Cook*(i) it was held that an affidavit of the due execution of a bill of sale was good, though sworn before a solicitor acting for both grantor and grantee of the bill. But as Ord. 38, r. 16, of Rules of the Supreme Court of 1883 provides that "no affidavit shall be sufficient if sworn before the commissioner acting for the party on whose behalf the affidavit is to be used," &c., it follows that the affidavit is bad if sworn before the solicitor for the grantee.(k)

It has already been stated that the ordinary time allowed for registration is seven clear days after execution of the bill of sale; and it was held on the construction of the former Bills of Sale Acts that although the goods comprised in the bill were seized under a *fi. fa.* within the time

(a) *Sims v. Trollope* (1897) 1 Q. B. 24; 66 L. J. 11, Q. B.; 75 L. T. Rep. N. S. 351; 45 W. R. 97.

(b) *Thomas v. Roberts*, 67 L. J. 478, Q. B.; 78 L. T. Rep. N. S. 712; (1898) 1 Q. B. 657.

(c) See *Ex parte Kahen*, sup.; *Foulger v. Taylor*, 29 L. J. 154, Ex.; 1 L. T. Rep. N. S. 57.

(d) *Pickard v. Bretz*, 29 L. J. 18, Ex.; 1 L. T. Rep. N. S. 45.

(e) *Jones v. Harris*, L. R. 7, Q. B. 157; 41 L. J. 6, Q. B.; 20 W. R. 143.

(f) *Murray v. Mackenzie*, L. R. 10 C. P. 625; *et ante*, p. 265; *Marks v. Derrick*, 80 L. T. Rep. N. S. 60.

(g) *Ford v. Kettle*, 9 Q. B. Div. 139; 51 L. J. 558, Q. B.; 46 L. T. Rep. N. S. 606; 30 W. R. 741.

(h) *Ex parte Johnson*; *Re Chapman*, 26 Ch. Div. 338; 53 L. J. 762, Ch.; 50 L. T. Rep. N. S. 214; 32 W. R. 693.

(i) 49 L. J. 767, Q. B.

(k) *Baker v. Ambrose* (1896), 2 Q. B. 372; 65 L. J. 589, Q. B.

allowed for registering the bill, yet if the grantee registered his bill within due time his title was not affected.(a)

The original bill of sale must be duly stamped prior to registration.(b)

Under the Bills of Sale Act, 1854, twenty-one days were allowed for registration, and to prevent registration a device was adopted of substituting a fresh bill from time to time within the twenty-one days (c); but this practice was stopped by the Bills of Sale Act, 1878, providing that a subsequent bill of sale executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale and comprising all or any part of the chattels comprised in the prior bill, and given as a security for the same debt or part thereof, is to the extent to which it is a security for the same debt or part thereof, and so far as respects such chattels, to be absolutely void, unless it is proved that the subsequent bill was *bond fide* given for the purpose of correcting some material error in the prior bill of sale (sect. 9).

The registration of a bill of sale must be renewed every five years, otherwise the registration becomes void. The renewal of registration is effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security. But a renewal of registration is not to be necessary on a transfer or assignment of a bill of sale (sect. 11).

The affidavit filed on re-registration must state the residence as it was stated in the bill of sale, even though it was there erroneously stated.(d)

A judge of the High Court on being satisfied that the omission to register the bill or the affidavit of renewal thereof within the time prescribed, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for registration, on such terms, as to security or otherwise, as he may think fit. (Act of 1878, s. 14.) This power cannot be exercised, however, after the title to the goods has vested in a trustee in bankruptcy or an execution creditor.(e)

It is material to remark that the effect of omitting to renew the registration of a bill of sale registered since the Bills of Sale Act, 1882, is to make such bill wholly void, and not merely void as against trustees in bankruptcy and execution creditors, as under the Act of 1878(f), but

(a) *Marples v. Hartley*, 30 L. J. 92, Q. B.; 3 L. T. Rep. N. S. 774; 9 W. R. 334; *Hunter v. Turner*, 23 W. R. 792; 32 L. T. Rep. N. S. 556.

(b) 54 & 55 Vict. c. 39, s. 41.

(c) *Ramsden v. Lupton*, L. R. 9, Q. B. 17; 43 L. J. 17, Q. B.

(d) *Ex parte Webster*; *Re Morris*, 22 Ch. Div. 136; 52 L. J. 375, Ch.; 48 L. T. Rep. N. S. 295; 31 W. R. 111.

(e) *Ex parte Parsons*; *Re Furber* (1893), 2 Q. B. Div. 122; 62 L. J. 365, Q. B.; 68 L. T. Rep. N. S. 717; *Crew v. Cummings*, 21 Q. B. Div. 420; 57 L. J. 641, Ch.; 36 W. R. 908.

(f) See *ante*, p. 255.

also void as between grantor and grantee, for by the Act of 1882, s. 8, the two acts are to be construed as one, and by sect. 8 if the bill is not duly registered it is to be void, even as between the parties.(a)

Defeasance.—By the Bills of Sale Act, 1878, if the bill of sale is made subject to any defeasance or condition, or declaration of trust, not contained in the body thereof, such defeasance or condition, &c., is to be deemed part of the bill, and must be written on the same paper or parchment therewith before registration, and be truly set forth in the copy filed, otherwise the registration is to be void (sect. 10, subsect. 3).

A defeasance is said to be a collateral deed or instrument made at the same time with some other principal deed or instrument, and containing certain conditions on the performance of which the estate or interest created by the principal deed or instrument may be defeated or rendered void.(b)

A collateral agreement not to register the bill of sale is not a defeasance or condition.(c) And a collateral agreement that a bill given as security for money shall not be made available until the grantee has exhausted certain other securities for the money advanced, is not a term for the "defeasance" of the security.(d) But a promissory note given by the grantor bearing the same date as a bill of sale, and practically part of the same contract which in its effect renders the goods comprised in the bill liable to be redeemed upon the performance of a condition not contained in the bill of sale, amounts to a defeasance or condition.(e)

Effect of Non-Registration—Priority.—We have already shown (*ante*, p. 255) that under the Bills of Sale Act, 1878, a bill not registered was still good as between grantor and grantee; but as between two grantees, the Act enacts that in case two or more bills of sale are given comprising in whole or in part any of the same chattels, they are to have priority in the order of the date of their registration respectively as regards the chattels (sect. 10). Under this section it has been held that a subsequent bill of sale, duly registered, takes precedence over a prior unregistered bill of sale as to any chattels comprised in both.(f) And, although the Act of 1878 applies to absolute assignments as well as to assignments by way of security, yet where a prior unregistered bill of sale is *absolute*, a subsequent registered bill of sale by way of security under the Act of 1882 obtains no priority over the absolute unregistered bill, for such bill

(a) *Fenton v. Blythe*, 25 Q. B. Div. 417; 59 L. J. 589, Q. B.; 63 L. T. Rep. N. S. 453; 39 W. R. 79.

(b) See Steph. Coms., vol. 1.

(c) *Ex parte Popplewell*; *Re Storey*, 21 Ch. Div. 73; 52 L. J. 39, Ch.; 31 W. R. 35.

(d) *Heseltine v. Simmons* (1892), 2 Q. B. 547; 62 L. J., 5 Q. B.; 67 L. T. Rep. N. S. 611; 41 W. R. 67.

(e) *Counsell v. London, &c., Loan Co.*, 19 Q. B. Div. 512; 56 L. J. 222, Q. B.; 36 W. R. 53 C. A.; *Edwards v. Marcus* (1894) 1 Q. B. 587; 63 L. J. 368, Q. B.

(f) *Conally v. Steer*, 7 Q. B. Div. 520; 50 L. J. 326, Q. B.; 29 W. R. 529; *Lyons v. Tucker*, 7 Q. B. Div. 523; 50 L. J. 661, Q. B.; 45 L. T. Rep. N. S. 408.

is not absolutely void, and therefore the grantor was not the "true owner" of the goods at the time of executing the second bill of sale which was made void by sect. 5 of the Act of 1882 against all persons except the grantor.(a) But where the first and the second bills of sale are by way of mortgage it is otherwise, for the grantor, after making the first bill, has still an equity of redemption remaining in him, and to that extent he is the true owner of the goods.(b)

It has already been stated(c) that the effect of omitting to renew the registration of a bill of sale registered since the operation of the Bills of Sale Act of 1882 is to render the bill void, even as between grantor and grantee.

Apparent Possession.—Under the Act of 1878, sect. 8, though an unregistered bill of sale was good between grantor and grantee, it was, respecting the chattels comprised therein, void as against trustees in bankruptcy, execution creditors, &c., if the grantor was in possession, or apparent possession, of the goods at or after the time of the filing of the petition in bankruptcy, &c., or the execution of process, and after the expiration of the seven days allowed for registration.(d)

This section is, however, repealed by sect. 15 of the Act of 1882, and replaced by sect. 8 of the latter Act, which provides that unless a bill of sale to which it applies—that is, a bill of sale given by way of security for money—is duly attested and registered, &c., such bill is to be void in respect of the personal chattels comprised therein. But as already stated, this repeal does not apply to bills of sale given by way of security for money made before the operation of the Act of 1882, and registered, or to absolute bills of sale.(e) Therefore, as to such bills of sale the doctrine of apparent possession may still apply.(f) And by sect. 4 of the Act of 1878, personal chattels are deemed to be in the "apparent possession" of the grantor of the bill of sale so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.

The following cases, amongst others, have been decided as to what amounts to apparent possession. Goods in the possession of a bailee of the grantor of the bill are nevertheless considered to be constructively in the possession of the grantor. And the fact that the grantee had demanded the goods from the bailee does not take them out of the apparent possession of the grantor.(g) So where goods and furniture are left in the possession of the grantor as servant to the grantee at a weekly salary, with liberty to use the furniture, the chattels are still

(a) *Tuck v. Southern Counties Deposit Bank*, 42 Ch. Div. 471, *et ante*, p. 254.

(b) *Thomas v. Searles* (1891) 2 Q. B. 408, *et ante*, p. 254.

(c) *Ante*, p. 268.

(d) See *ante*, p. 255.

(e) See *ante*, pp. 251, 255.

(f) See Bald. Bk., 353, 354, 7th edit.

(g) *Ancona v. Rogers*, 1 Ex. Div. 285; 46 L. J. 121, Ex.; 85 L. T. Rep. N. S. 115; 24 W. R. 1000.

considered as constructively in the grantor's possession(*a*); unless the public has had notice of any change of ownership(*b*) And where a man was put in possession of the goods by the grantee of the bill, but the grantor still retained a key of the house, and went in and out as he pleased, the goods were held to be in the apparent possession of the grantor(*c*)

On the other hand, if the chattels comprised in the bill are in the actual and visible possession of the sheriff under an execution issued by the grantee or a third person, they are not in the apparent possession of the grantor(*d*) And where the grantee of the bill of sale took possession of the goods, and advertised them for sale as the goods of the grantor sold under the bill, the goods, though still in the house of the grantor, were held to be no longer in the apparent possession of the grantor(*e*) For in cases like the foregoing there is sufficient evidence to show that the goods are no longer in the possession of the grantor(*f*)

Reputed Ownership.—Under the Bills of Sale Act, 1854, if the goods comprised in a bill of sale were left in the order and disposition of a trader-grantor, they could be taken by his trustee in bankruptcy, on that event happening, though the bill of sale was duly registered(*g*)

By the Bills of Sale Act, 1878, however, chattels comprised in a bill of sale which has been and continues to be duly registered under the Act are not to be deemed to be in the possession, order, or disposition of the grantor within the meaning of the Bankruptcy Act (sect. 20). This section is, however, repealed by sect. 15 of the Bills of Sale Act of 1882. But, as already stated, this repeal only applies to bills of sale given by way of security for money, and not to absolute bills of sale(*h*).

And, sect. 20 of the Act of 1878 still applies to and protects bills of sale given by way of security, and registered under that Act, and so long as such registration is subsisting, by force of s. 3 of the Act of 1882(*i*) It also protects absolute bills of sale as above stated. But the doctrine of reputed ownership applies to bills of sale given by way of security for money under the Act of 1882, though they are duly registered under that Act(*k*)

(*a*) *Pickard v. Marriage*, 1 Ex. Div. 364; 45 L. J. 594, Ex.; 24 W. R. 886; 35 L. T. Rep. N. S. 343.

(*b*) *Gibbons v. Hickson*, 55 L. J. 119, Q. B.; 53 L. T. Rep. N. S. 910; 34 W. R. 140.

(*c*) *Seal v. Claridge*, 7 Q. B. Div. 516; 50 L. J. 316, Q. B.; 29 W. R. 598; 44 L. T. Rep. N. S. 501, C. A.

(*d*) *Ex parte Saffery, Re Brenner*, 16 Ch. Div. 668; 44 L. T. Rep. N. S. 324; 29 W. R. 749, C. A.

(*e*) *Emanuel v. Bridger*, L. R. 9 Q. B. 286; 43 L. J. 96, Q. B.

(*f*) *Gibbons v. Hickson*, sup.

(*g*) *Badger v. Shaw*, 29 L. J. 73, Q. B.; 1 L. T. Rep. N. S. 323; 9 W. R. 210.

(*h*) *Swift v. Pannell*, 24 Ch. Div. 210; *Casson v. Churchley*, 53 L. J. 335, Q. B.; *Heseltine v. Simmons* (1892) 2 Q. B. 547; 62 L. J. 5 Q. B.; 67 L. T. Rep. N. S. 611, *et ante*, p. 251.

(*i*) *Ex parte Izard, Re Chapple*, 23 Ch. Div. 409; 52 L. J. 802; 49 L. T. Rep. N. S. 230.

(*k*) See sects. 3, 15.

On this subject the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.) enacts that all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt (1) in his *trade or business*, (2) by the *consent and permission* of the true owner under such circumstances that he is the reputed owner thereof, are (with certain exceptions) deemed his property, and go to his creditors.

There are the following differences between "apparent possession" under the Bills of Sale Acts and the possession, order, and disposition clause in the Bankruptcy Act, 1883. To bring the goods within the order and disposition clause of the Bankruptcy Act they must be (1) trade or business goods; therefore if the goods assigned by the bill of sale are not such goods that Act does not apply. (2) The goods must also remain in the grantor's possession with the consent and permission of the true owner thereof. And the goods are in the grantor's possession with such consent, although the grantee cannot seize them before the bankruptcy by reason of sect. 7 of the Bills of Sale Act of 1882,^(a) already considered. On the other hand, apparent possession is not confined to trade goods.

Another great difference is that apparent possession cannot be determined by a mere demand of the goods comprised in the bill of sale^(b); whereas a demand by the true owner, though not complied with, terminates reputed ownership, as the clause in the Bankruptcy Act requires the consent of the true owner to the possession, order, or disposition of the bankrupt.^(c) By the Bills of Sale Act, 1890,^(d) certain letters of hypothecation are exempted from the Bills of Sale Acts, but are within sect. 44 of the Bankruptcy Act, 1883, as to the doctrine of possession, order or disposition.

Poor and Parochial Rates.—Another instance of a bill of sale affording no protection is made by the Act of 1882, which enacts that a bill of sale to which it applies is to be no protection in respect of personal chattels included therein, which, but for such bill, would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates (sect. 14).

Searches.—By the Bills of Sale Act, 1882, provision is made for searching the register for bills of sale on payment of a fee of one shilling, and on like payment of a fee of one shilling for inspecting and for taking extracts therefrom, limited to the dates of execution, registration, renewal of registration and satisfaction of registered bills of sale, and to the names, addresses, and occupations of the parties, the amount of consideration, and to any further prescribed particulars (sect. 16). And by sect. 11, where a bill of sale is given by a person not residing in London facilities are given for making the search in the country. The section enacts that where the affidavit accompanying the

(a) *Re Ginger*, 76 L. T. Rep. N. S. 808; 66 L. J. 777, Q. B.; (1897) 2 Q. B. 461.

(b) See *ante*, p. 269.

(c) *Ex parte Ward*; *Re Couston*, 8 Ch. App. 144; 42 L. J. 17, Bk.; 27 L. T. Rep. N. S. 502; 21 W. R. 115.

(d) As amended by 54 & 55 Vict. c. 35, stated *ante*, p. 249.

bill of sale on registration states the residence of the person giving it, or against whom process issued, to be in some place outside the London bankruptcy district, or where the bill of sale describes the chattels enumerated therein to be in some place outside such district, the registrar must, within three clear days after registration in the principal registry transmit an abstract of the contents of the bill of sale to the county court registrar in whose district such places are situate.(a)

Entry of Satisfaction.—The Bills of Sale Act, 1878, enacts that the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt for which the bill was given has been satisfied or discharged (sect. 15).

The following is the form of a bill of sale given in the Schedule to the Act of 1882 :

Form of Bill of Sale.

THIS INDENTURE made the _____ day of _____ between A.B. of _____ of the one part and C.D. of _____ of the other part witnesseth that in consideration of the sum of £ _____ now paid to A.B. by C.D. the receipt of which the said A.B. hereby acknowledges [*or whatever else the consideration may be*] he the said A.B. doth hereby assign unto C.D. his executors administrators and assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of l. _____ and interest thereon at the rate of _____ per cent. per annum [*or whatever else may be the rate*]. And the said A.B. doth further agree and declare that he will duly pay to the said C.D. the principal sum aforesaid together with the interest then due by equal payments of l. _____ on the _____ day of _____ [*or whatever else may be the stipulated times or time of payment*]. And the said A.B. doth also agree with the said C.D. that he will [*here insert terms as to insurance payment of rent or otherwise which the parties may agree to for the maintenance or defeasance of the security*].

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A.B. in the presence of me E.F. [*add witness' name address and description*].

From the decisions given upon the construction of the Bills of Sale Act, 1882. which have already been stated, it will be seen that the proper course in preparing a bill of sale by way of security for money is to follow the statutory form, and embodying only those particulars which the Act expressly sanctions.

Stamps on Bills of Sale.

As already stated, before a bill of sale can be registered the original duly stamped must be produced to the officer.(b)

If the bill of sale is by way of security for money, it must be stamped as a mortgage ; but if the bill of sale be an absolute assignment on sale it must be stamped as a conveyance.(c)

(a) See also R.S.C., Ord LX. B.

(b) 54 & 55 Vict. c. 39, s. 41.

(c) 54 & 55 Vict. c. 39, Sched. ; *et ante*, pp. 153, 242.

Mortgage of a Ship.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), points out the mode of transfer of a British ship or any share therein, which is by a bill of sale containing a description of the ship, according to the form in the first schedule to the Act, executed by the transferor in the presence of and attested by a witness or witnesses, and registered at the port at which the ship is registered. The transferee must make the necessary declaration that he is qualified to be registered as owner, which is registered in like manner (see sects. 9, 10, 12, 14, 24-26; and as to infants, &c., see s. 55).

A ship may be held in shares, of which there are sixty-four, and sixty-four individuals may now be registered at the same time as owners, who must be (1) natural-born British subjects; or (2) persons duly naturalised, or made denizens, and still owing allegiance to Her Majesty, and resident or carrying on business within Her Majesty's dominions; or (3) bodies corporate, established under, subject to the laws of, and having their principal place of business within Her Majesty's dominions (sects. 1, 5).

By sect. 31 of the Act, a registered ship or a share therein may be made a security for a loan or other valuable consideration, and the mortgage security must be in form B. Sched. 1 to the Act, or as near thereto as circumstances permit, and on production of such instrument the registrar of the ship's port of registry is to record it in the register book. Mortgages are to be recorded in the order of time in which they are produced to the registrar, and he is to notify on each mortgage that it has been recorded by him, stating the day and hour thereof (sects. 31, 65). And mortgagees, where there are several of the same ship or share, are, notwithstanding any express or implied notice, to be entitled in priority, according to the date of registration, and not according to the date of each mortgage (sect. 33).

A mortgage of a ship passes to the mortgagee under the word "ship," articles necessary to the navigation of the ship, or to the prosecution of the adventure, which were on board at the date of the mortgage, and articles brought on board in substitution for them subsequently to the mortgage.(a) The form of mortgage given in Sch. 1 to the Act (form B.) includes "boats, guns, and appurtenances." But *cargo* does not pass unless expressly assigned.(b) Except for the purpose of making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee is not to be deemed the owner of the ship or share, nor is the mortgagor to be deemed to have ceased to be owner thereof (sect. 34).

When a registered mortgage is discharged, the registrar, on production of the mortgage deed indorsed with a receipt for the mortgage money and duly signed and attested, is to enter the fact in the register book, and thereupon the mortgagee's estate is to vest in the person in whom

(a) *Coltman v. Chamberlain*, 25 Q. B. Div. 328; 59 L. J. 568, Q. B.; 39 W. R. 12.

(b) *Langton v. Horton*, 5 Beav. 9; Scrut. M. S. Act, 1894, 30, 2nd edit.

(having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made (sect. 32).

Each registered mortgagee has power absolutely to dispose of the ship or share mortgaged to him and to give effectual receipts for the purchase money; but a subsequent registered mortgagee of the same ship or share cannot without the order of a court of competent jurisdiction sell the ship or share without the concurrence of every prior mortgagee (sect. 35). A registered mortgage of a ship or share is not affected by the mortgagor's bankruptcy after the date of the record of the mortgage (sect. 36).

A registered mortgage of a ship or share may be transferred in the form (C.) given in the first schedule to the Act, which must be duly registered (sect. 37).

The mortgage deed contains a description of the ship, &c., and then states that the undersigned mortgagor in consideration of the money lent covenants (1) for payment thereof with interest; and (2) for better securing the same, mortgages the ship or share and her boats, &c., to the mortgagee; and (3) concludes with a covenant that the mortgagor has power to mortgage, free from incumbrances.

Any transfer of a mortgage (to be indorsed on the mortgage) states that the within-mentioned mortgagee, for the consideration mentioned, transfers to the transferee the benefit of the within-written security. (Form C. Sched. 1).

As to certificates of mortgages, see sects. 39 to 43.

It seems that an unregistered mortgage of a British ship is valid between mortgagor and mortgagee; but it will be postponed to a registered mortgage.^(a)

It will be remembered that transfers of a ship or share thereof are not included in the term "Bill of Sale."^(b)

(a) See *Bell v. Blyth*, 4 Ch. App. 136; *Black v. Williams*, (1895) 1 Ch. 408; 64 L. J. 137, Ch.; 43 W. R. 346.

(b) See *ante*, p. 249.

CHAPTER VI.

BONDS.

BONDS are used in conveyancing practice for a variety of purposes, as (1) to secure the payment of a sum of money, with interest thereon ; or (2) the due payment of an annuity ; or (3) to secure the faithful conduct of a clerk ; or (4) may be given by a vendor of land to indemnify a purchaser who has taken a conveyance thereof with a doubtful title, in case of any suit or eviction arising thereon ; or (5) to indemnify a purchaser on account of certain title deeds being lost ; and in certain other cases.(a)

A bond is an instrument under seal, and therefore creates a specialty debt ; and, although since the operation of 32 & 33 Vict. c. 46 a specialty debt has no priority over a simple contract debt in the administration of the estate of a deceased person, yet by force of 3 & 4 Will. 4, c. 42, s. 3, such a debt is not barred until the expiration twenty years after the cause of action accrued, as will be fully shown in a subsequent chapter.

The person by whom the bond is given is termed the obligor, and the person to whom it is given the obligee.

No particular form of words are necessary to create a bond or obligation. Any sealed writing distinctly acknowledging a debt, present or future, is a bond. If there be no condition the bond is called single (*simplex obligatio*). But there is generally a condition added that if the obligor does, or forbears from doing some act, the obligation shall be void, or else shall remain in full force, and the bond is then termed a double or conditional one. The latter is the more usual.(b) The nature of the condition will in each case depend upon the particular object intended to be secured, as may be gathered from the cases to which a bond is applicable, stated *supra*.

A bond usually consists of (1) the obligation, whereby the obligor binds himself in a certain sum or penalty, which in the case of a money bond is generally double the amount to be secured by the bond. (2) Any recitals that may be necessary to explain the nature of the transaction follow, as in the case of a bond given by a vendor to the effect stated *supra* ; but in

(a) See forms of such bonds, 5 David. Conv. 279, *et seq.*, Pt. 2, 3rd edit. ; 2 Prid. Conv. 705, *et seq.*, 16th edit.

(b) See 2 Steph. Coms. 112, 113, 12th edit. ; 5 David. Conv. 268, Pt. 2, 3rd edit.

the case of a common money bond recitals are unnecessary and unusual.
(3) The condition, which sets out the acts on the performance of which the bond or obligation is not to be put in force.(a)

There may be two or more obligors or obligees, and the obligation may be joint only, or joint and several. If there are several obligors it is usual to make it joint and several, so that the obligee may have the option of proceeding against all or any of the obligees.

There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several.(b)

The heir of the obligor was at common law only chargeable when expressly named in the bond; and then only to the extent of the lands descended. Several attempts were made to remedy this, and by 47 Geo. 3, c. 74, and 11 Geo. 4 & 1 Will. 4, c. 47, the real estate of deceased *traders* was made liable to be administered in equity for the payment of their debts whether due by simple contract or specialty. This was extended to persons not traders by 3 & 4 Will. 4, c. 104; creditors by specialty in which the heirs were bound, having, however, a preference. The preference given to specialty debts was, as already stated, taken away by 32 & 33 Vict. c. 46. And by 44 & 45 Vict. c. 41, a covenant or bond under seal, though not expressed to bind heirs, is to operate in law to bind them and real estate, unless the contrary be expressed in the instrument (sect. 59). Executors and administrators and personal estate were liable without being named.(c)

Bonds given on an illegal or immoral consideration, as to induce the obligee to live in fornication with the obligor, are void, although a bond given in consideration of past cohabitation is good.(d) So bonds have been held void which contravene the provisions of some statute, as the statutes of Elizabeth against simony.(e)

If the condition of the bond be not observed the whole penalty named is not recoverable, for by 8 & 9 Will. 3, c. 11, in an action on a bond for non-performance of any covenants or agreements contained in the condition thereof or in any other instrument, the plaintiff must assign the breaches made by the obligor, and the jury must assess the amount of damages to which the obligee is entitled, and for that amount only is he entitled to issue execution (sect. 8). A common money bond, however, is not within the scope of the Act, for the amount due thereunder is a matter of computation, and may be made the subject of a special indorsement on a writ of summons.(f) But the Act applies to a bond for the payment

(a) See 2 David. Conv. 268, Pt. 2, 3rd edit.

(b) *Kendal v. Hamilton*, 4 App. Cas. 504; 48 L. J. 705, C. P.; 41 L. T. Rep. N. S. 418; 28 W. R. 97.

(c) See Will. R. P. 83, *et seq.*, 13th edit.

(d) See *Collins v. Blantern*, 1 Sm. L. C. 355, 368, 10th edit.; *Ex parte Naden*, 9 Ch. App. 670; 43 L. J. 121.

(e) 1 Sm. L. C. 369, 10th edit.; *et ante*, p. 76.

(f) *Gerrard v. Clowes*, (1892) 2 Q. B. 11; 61 L. J. 487, Q. B.; 67 L. T. Rep. N. S. 204.

of an annuity or of money by instalments where the whole amount is claimed by the writ.(a)

Although any amount of interest may be reserved (*ante*, p. 183), yet by 63 & 64 Vict. c. 51, where any proceedings are taken in any court (or might be taken) by a money lender (as defined by the Act) after the commencement of the Act (1st November, 1900) to recover any money lent, &c., the court, if the interest is, or expenses, &c., are excessive and the transaction unconscionable, &c., may reopen the transaction, and grant relief on payment of what is fairly due, and may set aside, &c., any security. This is not to affect the rights of a *bonâ fide* assignee for value. (Sects. 1, 6, 7.)

Stamps.—It will be seen from the schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39), that the stamp duties chargeable on bonds for payment or repayment of money are the same as on a mortgage, stated *ante*, p. 242. And as to a bond in relation to any annuity upon the original creation and sale thereof, see “Conveyance on Sale,” and sect. 60.

But a bond, covenant, or other instrument,

- (1) Being the only or principal security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period so that the total amount to be ultimately payable can be ascertained	...	...	...	...	{ The same <i>ad valorem</i> duty as a bond or covenant for such total amount.
For life or other indefinite period.					
For every 5 <i>l.</i> , and for any fractional part of 5 <i>l.</i> , of the annuity, or sum periodically payable	...	...	...	...	£ s. d. 0 2 6

- (2) Being a collateral, or additional, or substituted security for any of the above mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained	...	...	...	...	...	...	{ The same <i>ad valorem</i> duty as a bond or covenant of the same kind for such total amount.
In any other case,							
For every 5 <i>l.</i> , and for any fractional part of 5 <i>l.</i> , of the annuity or sum periodically payable	...	...	...	...	...	0 0 6	{ The same <i>ad valorem</i> duty as a bond for the amount limited.
Bond of any kind not specifically charged with duty, where the amount limited to be recoverable does not exceed 300 <i>l.</i>	...	...	...	...	...
In any other case	...	...	...	...	...	0 10 0	

(a) *Tuther v. Caralampi*, 21 Q. B. Div. 414; 59 L. T. Rep. N. S. 141; 37 W. R. 94.

CHAPTER VII.

LEASES.

How Created.

A LEASE is a grant or assurance of any lands or tenements, usually in consideration of a rent, or other annual recompense, to another for life, for years, or at will, but always for a less term than the lessor has in the premises, for if it be for the whole interest it is more properly an assignment than a lease.(a)

The usual words used to create a lease are grant or demise, but any words which amount to a grant are sufficient for a lease. The word "term" may be used to signify not only the limitation of time, but also the estate and interest that passes for that time.(b)

A lease for years may be made for any number of years, but the term rarely exceeds ninety-nine years.

Tenancy from Year to Year.—A tenancy from year to year may arise either from an express agreement of letting from year to year, or by implication of law.

A lease may, in some cases, be created by parol, in others it must be by writing. By the Statute of Frauds (29 Car. 2, c. 3, ss. 1, 2) all leases, except those not exceeding three years from the making and with a rent of not less than two-thirds of the improved value, must be in writing, and signed by the lessor or his agent authorised in writing. And by 8 & 9 Vict. c. 106, a lease required by law to be in writing of any tenements or hereditaments is to be void at law unless made by deed (sect. 3). But such void lease might be good as an agreement for a lease, and enforced in equity by specific performance.(c) And a lease for less than three years, with a right of renewal for more than three years, need not be by deed.(d) And as before shown, equity can specifically enforce a parol agreement relating to lands or tenements in cases of part performance thereof, or where the defendant has prevented the agreement from being

(a) 2 Bl. Com. 317; 1 Platt, Leases, 9.

(b) Co. Lit. 45, b; Woodf. L. & T. 138, 153, 16th edit.

(c) *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J. 812, Ch.

(d) *Hand v. Hall*, 2 Ex. Div. 355; 46 L. J. 603 Ex.; 36 L. T. Rep. N. S. 765; 25 W. R. 784.

reduced into writing by fraud, or where he does not insist on the statute as a bar to the suit.(a) Admitting a tenant into possession, under a parol agreement, is generally considered sufficient to take the case out of the statute.(b) And it has been held that, since the Judicature Acts, a person occupying under an agreement for a lease, of which specific performance would be decreed, is no longer merely tenant from year to year at law, made such by the payment of rent,(c) but that he is to be held in every branch of the court as holding on the terms of the agreement.(d)

Where, however, the grantee entered into possession of a farm under a provisional lease for twenty-one years, which was not binding on account of not being under seal, but contained certain covenants, some of which the tenant had broken before he had paid any rent, and consequently the landlord gave him notice to quit, and turned him out of possession; it was held that the tenancy was only one at will, and that no action for specific performance would lie, and that he was not entitled to recover.(e)

Nor will specific performance be enforced of an agreement for a lease from year to year.(f) But this subject will be treated of more fully subsequently.

A lease of an incorporeal hereditament, as a right of shooting or fishing, must be by deed, although for less than three years.(g)

A tenancy from year to year arises by implication where, without any agreement of letting or (prior, at least, to *Walsh v. Lonsdale*)(h) with an inoperative instrument of demise, there has been occupation and payment of rent measured by any aliquot part of a year.(i)

When the parties agree upon a tenancy "from year to year" at a certain rent, such a tenancy is created and can only be determined by half a year's notice to quit to expire at the anniversary of the commencement of the tenancy, unless there be express stipulation to the contrary. The notice may be given on the expiration of the first six months of the tenancy.(k) However, the parties may expressly agree that a yearly tenancy may be determined on whatever notice they stipulate.(l) And under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), a year's notice instead of a half year's notice is necessary, unless the parties agree in writing to exclude the Act (sect. 33).

(a) See fully, *ante*, p. 62.

(b) See *Pain v. Coombs*, 1 De G. & J. 34; *Lester v. Foxcroft*, 1 L. C. Eq. 881, 6th edit.; *et ante*, p. 62.

(c) See *Richardson v. Langridge*, L. C. C. 4.

(d) *Walsh v. Lonsdale*, 21 Ch. Div. 9; 52 L. J. 2, Ch; 46 L. T. Rep. N. S. 858; 31 W. R. 109; *Foster v. Reeves*, (1892) 2 Q. B. 255; 61 L. J. 763, Q. B.; 67 L. T. Rep. N. S. 537; 40 W. R. 695.

(e) *Coatsworth v. Johnson*, 55 L. J. 220, Q. B.; 54 L. T. Rep. N. S. 520.

(f) *Clayton v. Illingworth*, 10 Hare 451.

(g) *Bird v. Higginson*, 6 A. & E. 824.

(h) *Supra*.

(i) *Richardson v. Langridge*, *sup*.

(k) *Doe v. Mainbey*, 10 Q. B. 473; *Doe v. Taylor*, 1 Jur. 960.

(l) *Re Threlfall*, 16 Ch. Div. 274; 44 L. T. Rep. N. S. 74; *King v. Eversfield*, 77 L. T. Rep. N. S. 195; 66 L. J. 809, Ch.; (1897) 2 Q. B. 475.

If the letting is "for one year, and so on from year to year," without more, it enures as a tenancy for two years, and is not determinable by notice expiring before the end of the second year.(a) By express stipulation, however, it may be made determinable before the expiration of the second year.(b)

A demise for "one year" is not a tenancy from year to year, but determines at the end of the year without any notice to quit.(c)

A lease for years must be perfected by the entry of the lessee, for he has until entry only an *interesse termini*.(d) This interest is assignable, and may be extinguished by release.(e) But the lessee cannot till entry maintain an action on the covenant for quiet enjoyment, nor can he sue for trespass, or for damages.(f) Where, however, a term of years is created by bargain and sale, or other conveyance operating under the Statute of Uses (27 Hen. 8, c. 10), the estate or interest vests in the lessee at once without entry.(g)

Tenancy at Sufferance.—This tenancy arises where a person comes in by a lawful title or demise and continues the possession after such title or demise has determined, without either the agreement or disagreement of the owner of the property. As if a man takes a lease for a year, and after the year has expired continues to hold the premises without any fresh lease from the owner of the estate.(h) It may, however, become a tenancy from year to year by payment of rent. A landlord may maintain ejectment against a tenant at sufferance without any previous demand of possession.(i)

Tenancy at Will.—A tenancy at will is one held so as to be determinable at the will of either landlord or tenant. It may be constituted by written or verbal agreement, or it may, in some cases, arise by implication.(k) If an agreement be made to let premises so long as both parties please, reserving a rent accruing *de die in diem*, and not referable to a year or any aliquot part of year, the tenancy is one at will.(l)

A tenancy at will may be determined by a mere demand of possession by the landlord, or by express declaration of either landlord or tenant; or by the death of either party;(m) or by the landlord exercising acts of ownership over the property; as by conveying the reversion and giving notice thereof to the tenant.(n)

(a) *Doe v. Green*, 9 A. & E. 658.

(b) *Cannon Brewery v. Nash*, 77 L. T. Rep. N. S. 648, C. A.

(c) *Cobb v. Stokes*, 8 East, 358; *Right v. Darby*, 1 T. R. 159.

(d) 2 Bl. Com. 144.

(e) Burt. Comp. pl. 61, 917.

(f) *Wallis v. Hands* (1893), 2 Ch. 75; 62 L. J. 586, Ch.; 68 L. T. Rep. N. S. 428; but see *Gillard v. Cheshire Lines Company*, 32 W. R. 943.

(g) Will. R. P. 396, 13th edit.; *et ante*, p. 122.

(h) Co. Lit. 57 b, 271 a; Watk. Conv. 23, 24.

(i) Woodf. L. & T. 245, 246, 16th edit.; Red. & Ly., L. & T. 2, 5th edit.

(k) Co. Lit. 55, a; Lit. s. 68.

(l) *Richardson v. Langridge*, L.C.C. 4, *et seq*

(m) Co. Lit. 55, b; Woodf. L. and T. 240, 16th edit.

(n) *Doe v. Thomas*, 6 Ex. 857; 20 L. J. 367, Ex.; *Jarman v. Hale*, (1899) 1 Q. B. 994; 68 L. J. 681, Q. B.

Leases of Registered Land.—The Land Transfer Acts of 1875 and 1897 contain no special provision enabling a registered proprietor to grant a lease. But a lease may be granted under the provisions of sect. 49 of the Act of 1875, and notice thereof entered in the register under sect. 50. This point will be again noticed *post*, tit. "Land Transfer Acts and Rules."

Licences.—A licence must be distinguished from a lease. A licence passes no interest, but only makes an action lawful which without it would be unlawful; as to hunt in a man's park, but if in addition a right to carry away the deer killed is given, it is a licence coupled with a grant.^(a) And a licence, whether made by deed or not, is revocable unless coupled with a grant,^(b) or necessarily attended in its execution with expense to the licensee, and then not without tendering the expense.^(c) Moreover, a licence cannot, unless coupled with an interest in land, be assigned to a third party.^(d) And though the licensee may sue his licensor for breach of contract,^(e) he cannot sue a stranger in respect of the licence in his own name.^(f)

As the relationship of landlord and tenant is not created under a mere licence, the licensor cannot distrain;^(g) but an action lies for the enjoyment of the licence.^(h)

The Lease.—A lease consists of (1) the date, and parties; (2) the testatum containing words of present demise; (3) the parcels, or description of the property demised, subject to any exceptions or reservations made; (4) the habendum, containing the commencement and duration of the term; (5) the reddendum, setting out the rent or other consideration for the demise; and (6) the necessary covenants, provisoes, and conditions. It will be remembered that no covenants are implied by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7, on a demise by way of lease at a rent (see sub-sect. 5). We propose to treat of these requisites in their order.

Lessors.

Any person not under some legal disability may grant a lease of his lands, tenements, or hereditaments for any period not exceeding in duration his own estate or interest in the property leased; and a lease for a longer period, unless granted under some power conferred upon him by deed or statute, will determine upon the cessation of his interest. Thus a tenant for life, save under such a power, can only grant a lease

(a) *Muskett v. Hill*, 5 Bing. N. C. 694; *Hooper v. Clark*, L. R. 2 Q. B. 200.

(b) *Wood v. Leadbitter*, 13 M. & W. 838. (c) *Winter v. Brockwell*, 8 East, 308.

(d) *Muskett v. Hill*, *sup.*; *Wood v. Leadbitter*, *sup.*

(e) *Kerrison v. Smith*, (1897) 2 Q. B. 445; 66 L. J. 762, Q. B.; 77 L. T. Rep. N. S. 344.

(f) *Heap v. Hartley*, 42 Ch. Div. 461; 58 L. J. 790, Ch.; 17 W. R. 136.

(g) *Hancock v. Austin*, 14 C. B. N. S. 634; 32 L. J. 252, C. P.; 8 L. T. Rep. N. S. 429.

(h) *Daves v. Dowling*, 22 W. R. 770.

determinable on his death, although the term granted may be then unexpired,(a) save a lease of a farm or lands at a rack rent, which will, by force of 14 & 15 Vict. c. 25, determine at the end of the current year of the tenancy.

A lease may enure by estoppel; for where a man grants a lease under seal he is not permitted to avoid his own grant by proving that he had no interest in the demised premises at the time, unless he is a trustee for the public, deriving his authority from an Act of Parliament.(b) If one makes a lease for years by deed of lands wherein he has no estate at the time and afterwards acquire an estate, the lease which before operated by estoppel only, becomes a lease in interest.(c) And the lessee in possession is also bound by estoppel, and cannot dispute his landlord's title.(d) But this only applies to the title of the landlord who let him into possession.(e)

Having treated of lessors generally, we will now consider them more particularly.

Tenants in Fee Simple.—A tenant in fee simple may make a lease for life, or years, and upon such terms and conditions as he may impose.(f) But a lease in perpetuity is unknown to the common law, and could not be created between individuals by contract, though such an interest may arise under a statute;(g) as under the Settled Land Act, 1882, s. 10 (1), as shown *post*.

Tenants in Tail.—A tenant in tail could not at common law lease the entailed lands so as to bind his issue, or the remainderman, or the reversioner. By the 32 Hen. 8, c. 28, a partial remedy was provided, and by the Fines and Recoveries Act, 1874 (3 & 4 Will. 4, c. 74), every actual tenant in tail may dispose of the lands entailed for an estate in fee simple or for any *less estate*, as against his own issue and also against the remainderman or reversioner (sect. 15); which would include a lease for life or years; provided such lease be by deed; and if made by a married woman, provided her husband concur and the deed be acknowledged (sect. 40). And by sect. 41 every assurance of lands effected under the Act by a tenant in tail thereof, *except* a lease not exceeding twenty-one years commencing from the date thereof, or from any time not exceeding twelve calendar months from the date, where a rack rent, or not less than five-sixth parts of a rack rent, is reserved, must be duly enrolled within six calendar months from its execution.

Further, by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), a

(a) Wills. R. P. 26, 13th edit.; Woodf. L. & T. 1, 2.

(b) *Fairtitle v. Gilbert*, 2 T. R. 169; 1 Platt, Leases, 52.

(c) Bacon, Ab. Lease (O) 189; Platt, *sup*.

(d) *Delaney v. Fox*, 2 C. B. N. S. 768; *Beckett v. Bradley*, 7 M. & G. 994; *London and North-Western Railway Company v. West*, L. R. 2 C. P. 553; 36 L. J. 245, C. P.

(e) *Cornish v. Searell*, 8 B. & C. 471; *Carlton v. Bowcock*, 51 L. T. Rep. N. S. 659.

(f) Com. Dig. "Estates" (G. 2).

(g) *Sevenoaks, &c., Railway Company v. London, Chatham and Dover Railway Company*, 11 Ch. Div. 625, 635; 48 L. J. 513, Ch.

tenant in tail may lease the settled lands, without any application to the court, for any term not exceeding twenty-one years in the same manner and under the same conditions as a tenant for life (sect. 46). And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58, the powers of leasing given to tenants for life, may be exercised by tenants in tail, including a tenant in tail after possibility of issue extinct (sub-sect. 1, i. and vii.) as will be shown subsequently.

Tenants for Life.—As already stated, a tenant for life cannot grant a lease to extend beyond his own life, unless a power of leasing be given him by the instrument creating his estate, or except under the powers conferred by statute, to be presently noticed.

As to leases under powers conferred by settlement or will, the power was generally given to the tenant for life, if of full age, and to the trustees during the minority of the person entitled to the rents and profits of the estate. The power was usually restricted to the lands usually let, so as to prevent the tenant for life from leasing the principal mansion house, and park, &c., usually occupied by the owners of the estate.(a) The amount of rent, the duration of the term, and the covenants and conditions to be inserted, were also specified in the power.

A power to make "leases in possession" will not authorise a lease in reversion.(b) A lease of the reversion is, properly speaking, one that is granted for a term which is to commence from or after the expiration of a previous lease. It creates only an *interesse termini* until entry after the time appointed for its commencement.(c) A lease to commence from a future date where there is no prior lease subsisting is properly a lease *in futuro*.(d)

The person granting a lease under a power should observe the conditions and restrictions attached to the power, otherwise the lease will be void against the remainderman or reversioner.(e) However, a lease which does not do so may be good as between lessor and lessee by way of estoppel, though void as against those in remainder or reversion.(f) But provision has been made by statute for remedying defects in leases granted under powers. An Act of 1849 (12 & 13 Vict. c. 26), as amended by the Act of 1850, provides that where under a power a *bona fide* lease is granted, which, by reason of any deviation from the terms of the power, is invalid against those in remainder or reversion, and the lessee *has entered* thereunder, such lease is to be considered in equity as a *contract* for a valid lease under the power, except so far as any variation may be necessary in order to comply with the terms of the power. But if the remainderman or

(a) 3 Byth. & Jar. Conv. 8, 4th edit.

(b) *Opey v. Thomasius*, Ld. Raym. 132; 1 Platt, Leases, 444; 3 Byth. & Jar. 12, 4th edit.; *Lock v. Furze*, L. R. 1 C. P. 441; 35 L. J. 141, C. P.; 15 L. T. Rep. N. S. 161; 14 W. R. 403.

(c) Woodf. L. & T. 221, 16th edit.

(d) 1 Platt, Leases, 444.

(e) *Doe v. Sandham*, 1 T. R. 705; *Vivian v. Jegon*, L. R. 2 C. P. 422; 3 H. L. Cas. 285.

(f) *Yellowly v. Gower*, 24 L. J. 289, Ex.; 11 Ex. 274.

reversioner is able and willing to confirm the invalid lease without variation, the lessee is bound to accept such confirmation. By the Act of 1850 (13 & 14 Vict. c. 17), the mere acceptance of rent is not to be deemed a confirmation, as was provided by the Act of 1849, some memorandum of confirmation being requisite for this purpose.

And as to execution and attestation, as already stated (*ante* p. 99), by 22 & 23 Vict. c. 35, s. 12, a deed executed in the presence of, and attested by, two or more witnesses is, so far as regards execution and attestation thereof, to be a valid execution of a power of appointment by deed or other instrument in writing not testamentary, although the power may have prescribed additional formalities of execution or attestation.

The stat. 14 & 15 Vict. c. 25 also ameliorates the absence of an express power by a tenant for life to grant leases, by enacting that where a lease of a farm or lands held by a tenant at rack rent determines by the death or cesser of the estate of a landlord entitled for his life or other uncertain interest, instead of claims to emblements, the tenant is to continue to occupy such farm or lands until the expiration of the then current year of his tenancy, and then quit without any notice by or from either party. And the succeeding landlord or owner is to be entitled to recover and receive of the tenant a fair proportion of the rent from the death or cesser of the estate of the previous landlord to the time of the tenant so quitting, the terms and conditions of the lease being binding between such succeeding landlord and the tenant.

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46, any person entitled to the possession, &c., of any settled estates as tenant for life, or years determinable with a life or lives, or for any greater estate, either in his own right or in right of his wife, unless restrained by the settlement, and also any person entitled in possession, &c., to any unsettled estates as tenant by the curtesy or in dower, or in right of a wife seised in fee, may, without application to the court, lease the estates, except the principal mansion house and demesnes thereof and other lands usually occupied therewith, for a term not exceeding twenty-one years, to take effect in possession at or within one year from the making thereof; the lease to be by deed, at the best rent obtainable and without fine, the rent to be incident to the immediate reversion, impeachable of waste, and to contain a covenant for payment of rent, and such other usual covenants as the lessor thinks fit, and a condition of re-entry on non-payment of rent for twenty-eight days after it becomes due. The lessee must execute a counterpart of the lease.

By sect. 47 the demise is to be valid against the grantor and those in remainder under the settlement; and in the case of unsettled estates against the wife of a husband so demising who is entitled in right of his wife, &c.

By sect. 2, a tenant in tail after possibility of issue extinct is to be deemed a tenant for life.

By sect. 48, the execution of a lease by the lessor is to be deemed sufficient evidence that a counterpart thereof has been duly executed by the lessee.

By sect. 54, the tenant for life, &c., is to be deemed to be entitled to the possession, &c., although his estate is charged or incumbered by himself or the settlor; but the estate or interest of the person entitled to the charge or incumbrance is not affected unless he concurs in the lease.

By sect. 56, no lease of copyholds not warranted by the custom of the manor can be granted without the consent of the lord of the manor.

It will be noticed that the above leases may be made without any application to the court; and by sect. 4 of the Act other leases may be granted with the sanction of the court. It enacts that the court (Chancery Division) may, if it deems it proper and consistent, authorise leases of any settled estates, or of any rights or privileges over or affecting them, for any purpose whatever, whether involving waste or not, provided (1) that every such lease must take effect in possession within one year after the making thereof, and be for a term not exceeding—for an agricultural or occupation lease, twenty-one years; for a mining lease or lease connected with water, or other easements, forty years; a repairing lease, sixty years; and for a building lease, ninety-nine years; or where the court shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant leases (other than agricultural leases) for longer terms, then for such terms as the court directs. (2) The best rent must be reserved, payable half-yearly or oftener without taking any fine or other benefit in the nature thereof. (3) Where the lease is of any earth, coal, stone, or mineral a certain portion of the whole rent or payment reserved must be set aside and invested, when the person entitled in possession may work the same for his own benefit, one-fourth thereof, otherwise three-fourths thereof. (4) It must not authorise the felling of trees except where necessary for the purpose of buildings or works authorised by the lease. (5) Every such lease must be by deed, and contain a condition for re-entry on non-payment of rent for a period not exceeding twenty-eight days after it becomes due, and a counterpart must be executed (sect. 4).

In addition, it must contain such covenants, conditions, and stipulations as the court deems expedient with reference to the special circumstances of the demise (sect. 5).

The application to the court must be made by petition, and usually by the tenant for life (sect. 23), with the consent of the persons named in sect. 24; but the court may by sect. 25 dispense with their consent in certain cases. By sect. 26 notice is to be given to persons who do not concur in or consent to the application, but may by sects. 27 and 28 be dispensed with by the court under the circumstances therein specified. Guardians may act for infants, and committees for lunatics, and trustees in bankruptcy for bankrupts' estates, save that in the case of an infant or lunatic tenant in tail the special direction of the court is necessary (sect. 49).

The foregoing Act has not (with the exception of sect. 17) been repealed by the Settled Land Act, 1882, but it has, in most cases, been rendered obsolete by it, the powers given by the latter Act being much

more comprehensive. There are, however, cases where it may be advantageous to resort to the Settled Estates Act of 1877; as where a tenant in dower wishes to grant a lease, which she is empowered to do under sect. 46 of the above Act, but not under the Settled Land Act, 1882; which Act, with its amending Acts, we will next consider, so far as regards leases of settled lands.

By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), a tenant for life may (save as excepted by the Settled Land Act, 1890) lease the settled land, or any part thereof, or any easement, right, or privilege over or in relation thereto, for any purpose, whether involving waste or not, for any term not exceeding (1), in case of a building lease, ninety-nine years; (2) in case of a mining lease, sixty years; (3) in case of any other lease, twenty-one years (sect. 6).

By sect. 2 of the Act the tenant for life is the person who is for the time being, under a settlement, beneficially entitled to the possession of settled land for his life (sub-sect. 5). And if there are two or more persons so entitled as tenants in common or as joint tenants, &c., they together constitute the tenant for life (sub-sect. 6). And it is immaterial, for the purposes of the Act, that the settled land or the tenant for life's interest therein is incumbered (sub-sect. 7).

The word "possession" in sub-sect. 5 is to be read as in antithesis to "remainder" or "reversion"; and the words "so entitled" in sub-sect. 6 mean entitled for life.(a)

It has been held that an unlimited right of personal occupation of a dwelling-house and premises, arising under a settlement, if exercised, constitutes the occupier a tenant for life thereof within the Act.(b)

And by sect. 58 certain other persons, to be noticed subsequently, have the powers of a tenant for life.

The exceptions above referred to as to the power of leasing were first prescribed by sect. 15 of the Act of 1882, but this sect. is now repealed by the Act of 1890 (53 & 54 Vict. c. 69), s. 10, which enacts that the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith shall not be leased (or sold or exchanged) by the tenant for life without the consent of the trustees of the settlement or an order of the court. And where a house is usually occupied as a farm house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres, the house is not to be deemed a principal mansion house within the section.

The Act of 1882 prescribes the terms and conditions on which a lease is to be granted. By sect. 7 every lease must be by deed, and take effect in possession not later than twelve months after its date; and reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out for the benefit of the land, &c.; and

(a) *Re Atkinson*, 31 Ch. Div. 577; 54 L. T. Rep. N. S. 403; 34 W. R. 445.

(b) *Re Carne*, 68 L. J. 120, Ch.; 79 L. T. Rep. N. S. 542; 47 W. R. 352; (1899) 1 Ch. 324.

must contain a covenant by the lessee for payment of rent, and a condition of re-entry on non-payment thereof within a time therein specified not exceeding thirty days (sect. 7, sub-sect. 1-3.)

However, by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7 (iii), where the term does not exceed three years from the date, it may be made by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent.

A counterpart of every lease must be executed by the lessee, and delivered to the tenant for life; the execution of the lease by the tenant for life being sufficient evidence of this (45 & 46 Vict. c. 38, s. 7, sub-s. 4).

A statement in, or indorsed on, the lease, signed by the tenant for life, of any matter of fact or of calculation under this Act in relation to the lease, is, in favour of the lessee and those claiming under him, sufficient evidence of the matter stated (sub-sect. 5).

By the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, where the lease of settled land is made for the purposes of the Act, an exception is made as to the best rent obtainable. And under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 43, it is not necessary in estimating the best rent to take into account against the tenant any increase in value arising from improvements made by him.

By 47 & 48 Vict. c. 18, where a fine is received on the grant of a lease of settled land, it is to be capital money under the Settled Land Act of 1882 (s. 4), that is, money arising under the Act and receivable for the trusts and purposes of the settlement (45 & 46 Vict. c. 38, s. 2, sub-s. 9).

By the Act of 1882 (45 & 46 Vict. c. 38), s. 45, the tenant for life, when intending to make a lease, (a) must give notice thereof to *each* of the trustees of the settlement, by posting the notice in registered letters, and also give like notice to their solicitor, if such solicitor is known to the tenant for life; such letters being posted not less than one month before making the lease (sub-sect. 1): provided that, at the date of notice given, there are not less than two trustees, unless a contrary intention is expressed in the settlement (sub-sect. 2). But a person dealing in good faith with the tenant for life need not inquire respecting the giving of the notice (sub-sect. 3), and is otherwise protected by the Act (sect. 54). And by the Act of 1884 (47 & 48 Vict. c. 18), s. 5, the notice may be one of a general intention in that behalf. But the tenant for life is, upon request by a trustee of the settlement, to furnish him with particulars, &c., with respect to leases. And *any* trustee by writing may waive notice in any particular case or generally, and may accept less than a month's notice. And by the Act of 1890 (53 & 54 Vict. c. 69), a lease not exceeding twenty-one years, at the best rent, without fine, and the lessee not exempted from punishment for waste, may be made without notice, and notwithstanding there are no trustees of the settlement (sect. 7). And it seems that where notice is necessary, if

(a) Or a sale, exchange, partition, mortgage or charge (45 & 46 Vict. c. 38), s. 45; *et post*, tit. "Settlement."

there are no trustees to whom it can be given, the lease will be valid if the lessee has dealt with the lessor in good faith.^(a) Further information as to notice under these Acts will be found *post* tit. "Settlements."

Building Leases.—A building lease is one for building purposes, or connected therewith (45 & 46 Vict. c. 38, s. 2, sub-s. 10, iii.). By sect. 8, every building lease is to be made partly in consideration of the lessee, &c., having erected or agreeing to erect buildings, new or additional, or having improved or repaired buildings or agreeing to do so, or having executed or agreeing to execute on the land improvements authorised by the Act in connection with building purposes (sub-sect. 1).^(b)

A peppercorn rent or other rent less than that ultimately payable may be reserved for the first five years (sub-sect. 2). And when the land is contracted to be leased in lots the entire rent may be apportioned among the lots, but so that (1) the annual rent on any lease shall not be less than 10s.; and (2) the total amount of rents on all the leases not less than the total amount of the rents which ought to be reserved in respect of the whole land for the time being leased; and (3) the rent reserved by any lease must not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed (sub-sect. 3). But by 52 & 53 Vict. c. 36, such lease or agreement may contain an option, to be exercised within ten years, for the lessee to purchase the land leased at a price fixed at the date thereof, which must be the best obtainable, &c., and when received be capital money (sects. 2, 3).

Mining Leases.—By the Act of 1882, s. 2, sub-s. 10 (iv.), a mining lease is defined as one for any mining purpose or purposes connected therewith, and includes a grant or licence for any mining purposes. By sect. 9 (1) the rent may be made to be ascertainable by, or to vary according to, the acreage worked, or the quantity of mineral obtained or disposed of, or by any facilities given in that behalf (sect. 9); or may vary according to the price of the minerals gotten, &c. (53 & 54 Vict. c. 69, s. 8). (2) A fixed or minimum rent may be made payable with or without power for the lessee, if the rent, according to acreage or quantity, in any specified period, does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent (45 & 46 Vict. c. 38, s. 9, sub-sect. 1).

So the lease may be made partly in consideration of the lessee executing on the land leased improvements authorised by the Act for mining purposes (sub-sect. 2).

Where (1) it is the custom in the district in which any settled land is situate, for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than those specified in the Act, or in perpetuity; or (2) that it is difficult to make such leases

(a) *Mogridge v. Clapp*, (1892) 3 Ch. 382; 61 L. J. 534, Ch.; 40 W. R. 663.

(b) See *Re Daniell*, (1894) 3 Ch. 503; 64 L. J. 173, Ch.

or grants except for a longer term or on other conditions than the term and conditions specified in the Act, or except in perpetuity; then the court may on application authorise the tenant for life to make such leases or grants for any term, or in perpetuity, at fee farm or other rents, secured by condition of re-entry, or otherwise as may be expressed in the order (sect. 10). On a grant of land in fee simple for building purposes with a reservation thereout of a perpetual rent, it is to operate to create a rentcharge in fee simple, having incident thereto for recovery thereof the powers given by sect. 44 of the Conveyancing Act, 1881, &c. (53 & 54 Vict. c. 69, s. 9).

Under a mining lease, unless a contrary intention is expressed in the settlement, there must be from time to time set aside as capital money arising under the Act, part of the rent as follows, namely, if the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, the residue of the rent to go as rents and profits (45 & 46 Vict. c. 38, s. 11).^(a)

On a grant for building purposes or a building lease the tenant for life may make provision for parts of the settled land to be appropriated and laid out for streets, &c., and for vesting such appropriated parts in trustees, or any company or public body, on trusts, &c., for securing the continued appropriation thereof, and the repair of the streets, &c. A general deed may be executed for effecting these purposes, which may be enrolled in the central office of the Supreme Court (sect. 16).

By sect. 17 a mining lease (or a sale, exchange, or partition) may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way leaves or rights of way, rights of water and drainage, and other powers and easements, &c., connected with mining purposes, &c. (sub-sect. 1). The foregoing sections empower a tenant for life to grant a building lease with a reservation of the mines and minerals.^(b)

By the Act of 1882, sect. 12, and sect. 6 of the Act of 1890, the leasing power of a tenant for life also extends to the making of—(1) a lease to give effect to a contract for a lease entered into by his predecessors in title, which, if made by the predecessor, would be binding on the successors in title; (2) a leave for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and (3) a lease for confirming, as far as may be, a previous void or voidable lease; but the lease, when confirmed, must be such a lease as might, at the date of the original lease, have been lawfully granted.

So by sect. 31, the tenant for life may contract to make any lease, and may vary the terms thereof, with or without consideration,

(a) See *Re Ridge*, 31 Ch. Div. 504; 55 L. J. 265, Ch.; *Re Kemeys Tynte*, (1892) 2 Ch. 211; 40 W. R. 423.

(b) *Gladstone v. Gladstone*, (1900) 2 Ch. 101; 69 L. J. 455, Ch.; overruling *Re Nevill and Newell*, (1900) 1 Ch. 90; 81 L. T. Rep. N. S. 581.

provided the lease be in conformity with this Act (sub-sect. 1, iii.). And the contract is binding on and enures for the benefit of the settled land, and may be enforced against and by every successor in title for the time being of the tenant for life; but it may be varied or rescinded by any such successor in like manner, as if made by himself (sub-sect. 2). So he may accept a surrender of a contract for a lease and make a new contract for a lease, and for improvements, &c. (sub-sect. 1, iv., v.). And by sect. 13, the tenant for life may accept a surrender of a lease, &c., and grant a new lease.

And by sect. 14, he may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make such a lease of that land as the tenant for life can by the Act make of freehold land. The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of the fines, &c. The licence must be entered on the court rolls of the manor, of which entry the written certificate of the steward is sufficient evidence.

The tenant for life may by sects. 20 and 55 complete the lease(a) by deed, &c., which, to the extent and in the manner it is intended to and can operate under the Act, is effectual to pass the land conveyed, or the easement or right, &c., created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to (1) estates, interests, and charges having priority to the settlement; and (2) to such other, if any, estates, &c., as were conveyed or created for securing money actually raised at the date of the deed; and (3) all leases and grants at fee farm rents, or otherwise, and grants of easements, rights of common, &c., for value made, or agreed to be made, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them under the settlement, &c. And by 53 & 54 Vict. c. 69, s. 6, he may make any conveyance which is necessary and proper for giving effect to a valid contract entered into by a predecessor in title.

Where a person who in his own right is seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant is deemed tenant for life thereof (sect. 59).

And by sect. 60, where a tenant for life, or a person having the powers of a tenant for life, is an infant, &c., the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement, or if there are none, then by such person, and in such manner as the court, on application by the infant's guardian or next friend, orders.

By sect. 61, the foregoing provisions do not apply to a married woman; and where a married woman, who, if single, would have been tenant for life, &c., is entitled for her separate use, or under any statute for her separate property, or as a *feme sole*,(b) then she, without her husband, has the powers of a tenant for life under the Act. Where she is entitled otherwise, then she and her husband together have the powers

(a) Also a sale, exchange, partition, mortgage, or charge. (b) See *ante*, p. 21.

of a tenant for life under the Act (sub-sects. 2, 3). And a restraint on anticipation in the settlement does not prevent her exercising any power under the Act (sub-sect. 6).

By sect. 62, where a tenant for life, &c., is a lunatic, so found by inquisition, his committee may, under an order of the Lord Chancellor, &c., exercise the powers of a tenant for life under this Act, in his name and on his behalf. The order may be made on the petition of any person interested in the settled land, or of the lunatic's committee.

The Act does not apply to a sale in the case of a lunatic not so found by inquisition.(a) But under the Lunacy Act, 1890, ss. 116, 120, the power of leasing given by the Settled Land Act may be authorised, although the lunatic is not so found.(b)

By sect. 50, the powers under the Act of a tenant for life cannot be assigned or released, and do not pass, either by operation of law or otherwise, to his assignee, but remain exercisable by him notwithstanding any such assignment of, or any charge on, his estate or interest under the settlement (sub-sects. 1, 4). And a contract by him not to exercise his powers is void (sub-sect. 2). But the rights of an assignee for value of the estate or interest of the tenant for life cannot be affected without such assignee's consent; yet, unless he is actually in possession of the settled land, or part of it, his consent is not requisite for making a lease by the tenant for life, made at the best rent, without fine, and in other respects in conformity with this Act (sub-sect. 3). And an assignment or charge by the tenant for life of his estate or interest in consideration of marriage, or as part of a family arrangement, not being a security for payment of money advanced, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the above section (53 & 54 Vict. c. 69, s. 4). Nor can any provision be inserted in any settlement, or other instrument prohibiting a tenant for life from exercising any power under the Act by declaration, &c., or by limitation or gift over of the settled land, or by a limitation or gift of other real or personal property, or by the imposition of any condition, or by forfeiture, &c., and all such attempts are to be deemed void (45 & 46 Vict. c. 38, s. 51, sub-s. 1). And notwithstanding anything in the settlement, the exercise by the tenant for life of any power under the Act will not occasion a forfeiture (sect. 52). Nothing in the Act is to take away or prejudicially affect any power for the time being subsisting under a settlement or statute, exercisable by the tenant for life, or by the trustees with his consent, &c.; and the powers given by the Act are cumulative; but if the settlement conflicts with the Act, then the Act is to prevail.(c) And additional or larger powers than those conferred by this Act may be given by the settlement (sects. 56, 57).

(a) See *Re Baggs*, 63 L. J., 612, Ch.; 71 L. T. Rep. N. S. 138; (1894) 2 Ch. 416, n.

(b) *Re Salt*, (1896) 1 Ch. 117; 65 L. J. 152, Ch.; and see *post*.

(c) See *Re Chaytor's Settled Estates*, 25 Ch. Div. 651; 53 L. J. 312, Ch.; 32 W. R. 517; *et post*, tit. "Settlements."

By sect. 53, a tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is in relation to the exercise thereof by him, to be deemed to be in the position and to have the duties and the liabilities of a trustee for those parties.

Therefore payment of money to him, not intended to be a fine (*ante*, p. 287), upon the granting of a lease under the Act, renders the lease void against the trustees of the settlement, when no notice of such payment has been given to them.^(a) Other instances will be found *post* tit. "Settlements."

By sect. 58, each person, as follows, whose estate or interest is in possession^(b) is to have the powers of a tenant for life under the Act:

(i.) A tenant in tail, including a tenant in tail who is restrained by Act of Parliament from barring the entail, and although the reversion is in the Crown, and so that the exercise by him of his powers under the Act binds the Crown; but not where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

(ii.) A tenant in fee simple with an executory limitation or gift over on failure of his issue, or in any other event.^(c)

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under the Act bind the Crown.

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent.

(v.) A tenant for the life of another not holding merely under a lease at a rent.

(vi.) A tenant for his own or another's life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation or otherwise, or to be defeated by an executory limitation or gift over, or is subject to a trust for accumulation of income for payment of debts or other purpose.

Where a house, leased for thirty-one years, was devised to trustees on trust to permit the testator's widow to receive the rent "during the remainder of the term granted if she should so long live," it was held that she was not a person entitled to the powers of a tenant for life under the above sub-section, and could not accept a surrender and make a new lease of the house.^(d)

But on a devise to the use of a person "so long as he should reside on the estate," and on his failing to comply with the condition, the estate was given over, it was held that he had, notwithstanding the condition,

(a) *Chandler v. Bradley*, 75 L. T. Rep. N. S. 581; (1897) 1 Ch. 315; 66 L. J. 215, Ch.

(b) As to the meaning of "possession," see *ante*, p. 286.

(c) See hereon, *Re Morgan*, 24 Ch. Div. 114; 53 L. J. 85, Ch.; 31 W. R. 948.

(d) *Re Hasle's S. E.*, 29 Ch. Div. 78; 54 L. J. 628, Ch.; 52 L. T. Rep. N. S. 947; 33 W. R. 759.

the powers of a tenant for life.(a) However, it has also been held that where the breach of such a condition is by the terms of the settlement to work a forfeiture, then if no sale takes place the condition is enforceable, notwithstanding sect. 51 of the Act.(b)

(vii.) A tenant in tail after possibility of issue extinct.

(viii.) A tenant by the curtesy.

As the estate of a tenant by the curtesy arises by common law or by custom, and not under any settlement, it was difficult to apply the Act to such a case, as, there being no settlement, there could be no trustees to whom notice could be given of any intended lease, sale, &c. But by 47 & 48 Vict. c. 18, s. 8, for the purposes of the Settled Land Act, 1882, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

It will be noticed that the powers of a tenant for life are not given to a doweress.

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or forfeiture of his interest therein on bankruptcy, or other event.

The words "a person entitled to the income" in the above sub-sect. mean entitled under the limitations of the settlement, and even if the incumbrances on the estate exhaust the income thereof he has the powers of a tenant for life.(c)

By sub-sect. 2 of sect. 58 the provisions of the Act referring to a tenant for life, a settlement, and to settled land, extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

Tenant pur autre vie.—A tenant *pur autre vie* is at common law in a similar position to an ordinary tenant for life, except that a lease by him, not under some power, will determine not at his own death but at the death of the *cestui que vie*.(d) He may also grant leases under sect. 46 of the Settled Estates Act, 1877; and under the Settled Land Act, 1882, unless holding under a lease at a rent (sect. 58, sub-sect. 1, v.).

Tenants in Curtesy and Dower.—A tenant by the curtesy or in dower may grant leases pursuant to sect. 46 of the Settled Estates Act, 1877, as already (*ante*, p. 284) shown, and a tenant by the curtesy may exercise the powers of leasing given to the tenants for life by the Settled Land Act, 1882, but not a tenant in dower, as above pointed out. Subject to the provisions of the above statutes the powers of tenants in curtesy or dower of leasing are, at common law, similar to those of a tenant for life,(e) already considered.

(a) *Re Pagett's S. E.*, 30 Ch. Div. 161; 55 L. J. 42, Ch.; 53 L. T. Rep. N. S. 90; 33 W. R. 898.

(b) *Re Haynes* 37 Ch. Div. 306; 57 L. J. 519, Ch.; 58 L. T. Rep. N. S. 14; 36 W. R. 321.

(c) *Re Jones*, 26 Ch. Div. 736; 53 L. J. 807, Ch.; 50 L. T. Rep. N. S. 466; 32 W. R. 735.

(d) 2 Bl. Com. 136.

(e) Woodf. L. & T. 12, 15th edit.; 1 Platt, Leases, 97.

Tenants for years.—A tenant for years, unless restrained by stipulation, may make an under lease of the premises held for any less term than he has therein.(a)

Tenants from year to year.—A tenant from year to year may, unless restrained by stipulation, underlet the premises from year to year, and the subtenancy will continue during the continuance of the original demise to him,(b) and he has a reversion which enables him to distrain for rent.(c)

Tenants at Will and at Sufferance.—A tenant at will, it is said, cannot demise, yet if possession be taken under his demise, a tenancy by estoppel as between him and his lessee may arise.(d) And although a mortgagor has sometimes been said to be a tenant at will to the mortgagee, he may, as we have already seen (*ante*, p. 194), by force of the Conveyancing Act of 1881, s. 18, make leases according to the provisions of that statute.

A tenant at sufferance has no demisable estate, at least against anyone but himself.(e)

Joint Tenants hold *per my et per tout*, but, for the purposes of alienation, each has but a right to a moiety; they may, therefore, join or sever in making leases. If there be two joint tenants, and each lease the whole separately on the same day by separate instruments, the moiety only of each will pass.(f) If they concur in demising, there is but one lease, and they make but one lessor, and if one of them dies the lessee's interest still continues, and the survivor is entitled to the whole rent;(g) for there is a right of survivorship between them. In a joint lease by them, the demise by, reservations to, and covenants with them, are made in the same manner as in a lease granted by a sole owner, the plural number being substituted for the singular.(h)

Tenants in Common have several freeholds, and may join or sever in making leases. And a lease granted by them jointly operates as a separate demise by each of his undivided share, and a confirmation of his companion's demise.(i) A tenant in common may make a lease of his part to his co-tenant, as well as to a stranger.(k) If one tenant in common of a house voluntarily expends money on ordinary repairs he has no right of action against his co-tenant for contribution.(l)

Co-parceners have a distinct though undivided share in the land, and they may join or sever in making leases thereof. If they join in a lease it operates as a separate demise by each of her share.(m)

(a) Woodf. L. & T. 14, 15th edit.

(b) *Pike v. Eyre*, 9 B. & C. 909.

(c) *Curtis v. Wheeler*, Moo. & M. 493.

(d) Woodf. L. & T. 15, 15th edit.; 1 Platt, Leases, 104.

(e) 1 Platt, Leases, 122.

(f) Co. Lit. 186, a.; 1 Platt, Leases, 124, 125.

(g) *Henstead's Case*, 5 Co. Rep. 10, b.; *Doe v. Summerset*, 1 B. & Ad. 135, 140.

(h) 3 Byth. & Jar. Conv. 43, 4th edit.

(i) Co. Lit. 45, a. 196, b.; Com. Dig. "Estates" (K. 8); *Thompson v. Hawksill*, 19 C. B. N. S. 713; 38 L. J. 18 C. P.; 14 W. R. 11.

(k) 1 Platt, Leases, 131; *Leigh v. Dickeson*, 15 Q. B. Div. 60; 54 L. J. 18, Q. B.

(l) *Leigh v. Dickeson*, sup.

(m) 2 Bl. Com. 182, 188; 1 Platt, Leases, 13

Reversioners and Remaindermen.—A person having a present right to the future enjoyment of an estate, as a reversioner or remainderman, expectant upon an estate for years, for life, or in tail, may make a lease which will take effect in possession or the determination of the preceding estate.(a)

Copyholds.—Should the tenure of the property it is proposed to let be copyhold, it should be borne in mind that the copyholder can only lease it for one year, unless there be a custom of the particular manor in which such property lies to lease it for a longer period, or he obtains a licence from the lord of the manor. And a lease for more than one year without such custom or licence will cause a forfeiture to the lord, though good and binding till the lord enters.(b)

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 9, lords of settled manors may be empowered to grant licences to their copyhold tenants to lease their lands to the same extent, and for the same purposes as leases may be authorised or granted of freehold land, detailed, *ante*, p. 284. But by sect. 56 it is enacted that nothing in the Act is to authorise the granting of a lease of copyholds not warranted by the custom of the manor, without the consent of the lord.

By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 14, a tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make such a lease of that land as the tenant for life can by this Act make of freehold land. The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of the fines, &c. The licence must be entered on the court rolls of the manor, of which entry the written certificate of the steward is sufficient evidence.

The Crown.—By 10 Geo. 4, c. 50, most of the Crown lands have been vested in the Commissioners of Woods and Forests, who may grant leases for any term not exceeding thirty-one years, and building leases for ninety-nine years, subject to the conditions prescribed by the Act (see sects. 8, 22 *et seq.*). And by 36 & 37 Vict. c. 36, mining leases may be granted for sixty-three years (sect. 4).

Corporations(c) cannot make a valid legal demise of the corporate lands save by deed under their common seal. However, one who enters upon, occupies and pays rent for, corporate property under a demise for a term of years made on behalf of a corporation, but not under their common seal, becomes tenant from year to year on such terms of the demise as are applicable to a yearly tenancy.(d)

As to municipal corporations, by 45 & 46 Vict. c. 50, s. 108 (amended by 51 & 52 Vict. c. 41, s. 72), municipal corporations cannot demise their lands for more than thirty-one years without the approval of the Local Government Board, and the lease must be on the conditions in the Act

(a) Platt, Leases, 51; *et ante*, p. 283.

(b) Scriv. Cop. 179, 192, 6th edit.

(c) See *ante*, p. 1.

(d) *Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 162; 38 L. J. 93, Ex. see also *Walsh v. Lonsdale*, 21 Ch. Div. 9, stated *ante*, p. 279.

specified; or in the case of buildings or a building lease, for not more than seventy-five years (sect. 108), and, by sect. 110, such corporations are empowered to renew leases, and, by sect. 111, they may, with the same approval, make grants or leases of any part of the corporate land for working men's dwellings for 999 years, or any shorter term.

As to ecclesiastical corporations, by 32 Hen. 8, c. 28 (commonly called the *Enabling Act*), ecclesiastical corporations *sole, except* parsons and vicars, were enabled to make leases by indenture of such part of their church lands as were usually let, for not more than twenty-one years, or three lives, upon the conditions in the Act specified, no confirmation being necessary; leases for longer periods were made with confirmation, but these were *restrained* by 1 Eliz. c. 19, s. 5, and 13 Eliz. c. 10, s. 3, from being granted for longer terms than twenty-one years, or three lives. These statutes were explained and amended by 14 Eliz. c. 11, and 18 Eliz. cc. 6, 11, and 6 & 7 Will. 4, c. 20, to which the reader is referred. (a) And by 5 & 6 Vict. c. 27, the incumbent of a benefice may, with the consent of the bishop and patron, grant farming leases of lands belonging to his benefice (save the parsonage house and ten acres of glebe, &c.), for not more than fourteen years. In certain cases, however, the lease may be granted for twenty years.

And by 5 & 6 Vict. c. 108 (amended by 21 & 22 Vict. c. 57) ecclesiastical corporations, aggregate or sole, save as in the Act excepted, may with the consents and on the terms and conditions therein specified, grant building and repairing leases for ninety-nine years, and mining and water leases for 60 years. The statute 14 & 15 Vict. c. 104, s. 9, regulates leases of lands acquired under it. And 23 & 24 Vict. c. 124, s. 8, regulates leases by archbishops and bishops, as to lands acquired under it.

And by 24 & 25 Vict. c. 105, leases of copyholds by any rector, &c., were to be made in accordance with the provisions of 5 & 6 Vict. cc. 27 and 108, and 21 & 22 Vict. c. 57. The Act has been amended by 25 & 26 Vict. c. 52.

As to leases by the Universities of Oxford, Cambridge, and Durham and the several colleges thereof, and the colleges of Winchester and Eton, see *ante*, p. 6.

Parish Officers, &c.—The statute 59 Geo. 3, c. 12, vests the real property belonging to a parish in the churchwardens and overseers in succession as a corporation (sect. 17), and empowers them, with the consent of the vestry, to let portions of the lands to the poor, at such rent and for such terms as the vestry determines (sect. 13). But by the Local Government Act, 1894, as regards rural parishes, the interest, power, duties, and liabilities of parish officers are (save as in the Act excepted) transferred to the parish council. (b)

By the Allotments Act, 1887 (50 & 51 Vict. c. 48), (c) sanitary authorities may purchase or hire suitable land for the purpose of letting it

(a) These statutes will be found in Woodf. L. & T., pp. 21 to 25, 15th edit.

(b) See 56 & 57 Vict. c. 73, ss. 1, 5 (2), 6 (1), 52 (4, 5), 67; *et ante*, p. 7.

(c) See *ante*, p. 8.

in allotment (see sects. 2, 6, 7, 8). By the Local Government Act, 1894, the district council is substituted for the sanitary authority (sects. 21, 25). And by sects. 8 (2) and 10 (1, 6) of the latter Act similar powers to the above are to apply to any allotment hired by a parish council(*a*) as if that council were the sanitary authority, &c.

By the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), when land has been acquired or hired by a county council on lease, or otherwise, they may let it in accordance with the provisions of the Act (sects. 1, 2, 4), to which the reader is referred.

Trustees of Charities.—By 16 & 17 Vict. c. 137, any two of the Charity Commissioners sitting as a board (sect. 6) may authorise leases of charity lands for building, repairing, or other purposes (sect. 21), which have the like effect as if authorised by the express terms of the trust affecting the charity (sect. 26). And by 18 & 19 Vict. c. 124, ss. 15 and 16, the acting(*b*) trustees of every charity were empowered to grant all such leases of lands belonging to the charity, and vested in the official trustee thereof(*c*) as they might have granted if vested in themselves, for the periods, &c., mentioned in sect. 29 of the Act.

Trustees of Settled Estates.—The powers formerly inserted in settlements of land enabling either the tenant for life or the trustees thereof to grant leases, have been rendered unnecessary by the Settled Land Act, 1882, which, as already shown(*d*) gives extensive powers of leasing settled lands to the tenant for life; and in addition renders his consent necessary to the exercise by the trustees of any power of leasing conferred by the settlement(*e*). Yet, as we have already shown, the Court may under the Settled Estates Act, 1877, authorise leases subject to the conditions therein specified(*f*). And this power may, in conformity with the provisions of the Act, be vested in trustees(*g*). But as already stated(*h*) it will now be seldom necessary to resort to that Act.

Executors and Administrators.—Leaseholds for years vest in the executor or administrator of the deceased owner, and he may sell or underlet them. An executor may do this before probate, as he derives his power under his testator's will; but an administrator cannot do so until he has obtained letters of administration, as his title arises under them(*i*). Again, a lease by one of several executors is good, as they have a joint and several authority(*k*); but it was held that one of

(*a*) If there be no separate parish council, see sect. 19, sub-sects. 7, 10.

(*b*) See also 32 & 33 Vict. c. 110, s. 12.

(*c*) Formerly vested in the "Treasurer of Public Charities."

(*d*) *Ante*, pp. 286 to 292.

(*e*) 45 & 46 Vict. c. 38, s. 56, sub-s. 2; *Re Duke of Newcastle's Settled Estates*, 24 Ch. Div. 129; 52 L. J. 645, Ch.; 48 L. T. Rep. N. S. 779; 31 W. R. 782; *Re Clitheroes*, 31 Ch. Div. 135; 55 L. J. 107, Ch.

(*f*) *Ante*, p. 285.

(*g*) 40 & 41 Vict. c. 18, ss. 10, 13, 14.

(*h*) *Ante*, p. 285.

(*i*) See 1 Platt, Leases, 367; Will. Exors. 306, 309, 636, 8th edit.; *et ante*, p. 31.

(*k*) *Simpson v. Gutteridge*, 1 Madd. 609; *Jacomb v. Harwood*, 2 Ves. 265.

several administrators could not act alone,(a) however, it has since been decided otherwise.(b)

If a term of years has been specifically bequeathed, it will pass to the legatee by the mere assent of the executor without any assignment by him; therefore a person proposing to take an assignment of the lease or underlease from an executor should either have the concurrence of the legatee, or ascertain from the executor that he has not assented to the bequest.(c) And the rule, intimated in *Re Tanqueray-Willaume* (stated *ante*, p. 26), that where an executor is selling real estate after twenty years from the testator's death the purchaser is put upon inquiry, does not apply to the case of an executor selling leaseholds.(d)

Where an executor or administrator is a married woman, underleases might formerly have been granted by the husband alone, or by her with his concurrence.(e) And although by 45 & 46 Vict. c. 75, s. 18, a married woman who is an executrix or an administratrix may sue and be sued, and may transfer "any such annuity," &c., as therein mentioned,(f) without her husband, as if she were a *feme sole* (sect. 18); yet as no mention is made in the section of real estate, or any interest therein, and as sects. 1 and 2 of the Act only apply to her separate property, she will not, though married after the Act, be able to transfer leaseholds held as an executrix or administratrix;(g) or, it is presumed, grant underleases thereout without her husband's concurrence.

In fact, an executor or administrator is considered in equity as a trustee, and his primary duty is to sell the testator's or intestate's estate for payment of his debts. No doubt, having the legal estate in leaseholds, he may, in some cases, underlet them, and the underleases will be supported in equity as in law. But that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets; and the executor or administrator cannot grant an underlease with an option of purchase at a future time.(h) And although by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), in case of a death after 31st December, 1897, real estate (not being copyhold or customary freehold requiring admission to complete a title) vested in any person without a right of survivorship in any other person devolves upon and becomes vested in his personal representative like a chattel real, notwithstanding any

(a) *Hudson v. Hudson*, 1 Atk. 460.

(b) *Jacomb v. Harwood*, sup.; and see *ante*, p. 31.

(c) *Doe v. Guy*, 3 East, 120; *Re Culverhouse*; *Cook v. Culverhouse*, (1896) 2 Ch. 251; 74 L. T. Rep. N. S. 347; 45 W. R. 10.

(d) *Re Whistler*, 25 Ch. Div. 561; 57 L. T. Rep. N. S. 77; 56 L. J. 827, Ch.; 35 W. R. 662; *Re Venn and Furze's Contract*, (1894) 2 Ch. 101; 63 L. J. 303, Ch.; 70 L. T. Rep. N. S. 312.

(e) See 3 Byth. & Jar. 75, 4th edit.

(f) Set out, *ante*, p. 20.

(g) *Re Harkness and Allsop*, (1896) 2 Ch. 358; 65 L. J. 726, Ch.; 74 L. T. Rep. N. S. 652; 44 W. R. 683.

(h) *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. Div. 236; 50 L. J. 308, Ch.; 43 L. T. Rep. N. S. 743; 29 W. R. 113.

testamentary disposition (sect. 1); yet, as already (a) shown, the personal representative takes such real estate for the purposes of administration only, having powers over it similar to those which he has over the personalty for the same purpose, with corresponding liabilities in regard to it.

Agents.—An agent having sufficient authority may bind his principal by leases and agreements for leases, made on his principal's behalf. (b) But a mere steward has no general authority to enter into contracts for granting leases of farms for a term of years. (c) And a farm bailiff accustomed to let from year to year on ordinary terms has no authority to let upon unusual terms unknown to the owner. (d)

The agent's authority to execute a lease under seal must also be under seal; (e) as where the lease is for more than three years. (f) but if the lease or agreement is not under seal, the agent's authority need not be under seal, or even in writing. (g) The agent should execute the lease in the name of his principal, and as agent; for, if he executes it in his own name only, he may become personally liable as principal, although in the body of the instrument he is described as agent. (h) And although the donor of a power of attorney may, by 44 & 45 Vict. c. 41, execute an instrument in his own name, and signature, and seal, by the authority of the donor of the power (sect. 46), yet the above precaution seems still desirable. (i)

Infants and Guardians.—At common law a lease by an infant is not void, but it is voidable by him on his attaining his majority; (k) if, however, the lease reserves a rent he cannot avoid it until of full age. (l) And if the infant dies under age his heir may avoid the lease. (m) To avoid a lease by an infant, under which the lessee is in possession, upon the lessor attaining twenty-one, some act of notoriety, as ejectment, entry, or demand of possession is requisite; the execution of a second lease to another person is not of itself sufficient to divert the estate created by the first lease. (n) An act of confirmation may be inferred from the acceptance of rent. (o)

The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), which provides

(a) See fully *ante*, p. 29; *et post*, tit. "Wills."

(b) *Hamilton v. Clanricard (Earl)*, 1 Bro. P. C. 341.

(c) *Collen v. Gardner*, 21 Beav. 540; 1 Platt, Leases, 399.

(d) *Turner v. Hutchinson*, 2 F. & F. 185.

(e) Woodf. L. & T. 67, 16th edit.; *Harrison v. Jackson*, 7 T. R. 207.

(f) *Ante*, p. 278.

(g) *Coles v. Trecothick*, 9 Ves. 234, 250; *Heard v. Pilley*, 4 Ch. App. 548, 38 L. J. 718; 21 L. T. Rep. N. S. 68; 17 W. R. 750.

(h) *Tanner v. Christian*, 4 E. & B. 591; *Cook v. Wilson*, 1 C. B. N. S. 153; 26 L. J. 15, C. P.; *Paice v. Walker*, L. R. 5 Ex. 173; 39 L. J. 109, Ex.

(i) 1 David. Conv. 101, 5th edit.

(k) 1 Platt, Leases, 30, 31; 2 Prest. Conv. 248; *Slator v. Brady*, 14 Ir. Com. L. R. 61.

(l) *Slator v. Trimble*, 14 Ir. Com. L. R. 342.

(m) 1 Platt, Leases, 32.

(n) *Slator v. Brady*, *sup.*

(o) 1 Platt, Leases, 32.

that no action is to be brought upon any ratification made after full age of a contract made during infancy, even if there be a new consideration for such ratification, does not, it seems, extend to a confirmation of an infant's leases, the Act applying only to the three classes of contracts mentioned in sect. 1, viz.: (1) for the payment of money lent; (2) for goods supplied; and (3) accounts stated. (a) The lease of an infant to be good must be his own personal act, and not by an agent. (b)

By 11 Geo. 4 & 1 Will. 4, c. 65, the Court (Chancery Division) may authorise leases of lands belonging to an infant, upon the application of the infant or his guardian, upon the terms and subject to the conditions in the Act specified (sect. 17); so by the same authority and on the like application, surrenders may be accepted of renewable leases, and new leases granted (sects. 16, 18).

By the Settled Estates Act, 1877, as we have already shown (*ante*, pp. 284, 285), certain powers of leasing are given over settled estates, and by sect. 49 all powers given by the Act, and all applications to the Court under it, &c., may be executed, made, &c., by *guardians* on behalf of infants; but in the case of an infant tenant in tail a special direction is necessary. And by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 41, where an infant in his own right is seised or entitled to land in fee simple, &c., the land is to be deemed a settled estate within the Settled Estates Act, 1877.

Although the foregoing provisions are not abolished by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), they are in practice superseded by it; and, as already (*ante*, p. 290) shown, sects. 59 and 60 of the Act make provision for the exercise of the powers of the Act when the tenant for life is an infant.

And irrespective of the above provisions as to guardians, a guardian in socage, or at common law, could always demise the infant's lands, but only until the infant attained the age of fourteen; and a testamentary guardian—that is one appointed under 12 Car. 2, c. 24, or 49 & 50 Vict. c. 27—may lease the infant's lands until he is twenty-one. (c)

Lunatics.—A person of unsound mind, not so found by inquisition, may make a lease, but it may be avoided by him on his showing that the lessee was at the time of the contract aware of his insanity. (d) By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), the judge in lunacy may authorise the lunatic's committee to grant leases of any property of the lunatic for building, agricultural, or other purposes, and leases of minerals forming part of the lunatic's property, whether already worked or not, and either with or without the surface or other land; also to

(a) See *Whittingham v. Murdy*, 60 L. T. Rep. N. S. 956; *Duncan v. Dixon*, 44 Ch. Div. 211; 59 L. J. 437, Ch.; 62 L. T. Rep. N. S. 319; 38 W. R. 700; *et ante*, p. 11.

(b) *Doe d. Thomas v. Roberts*, 16 M. & W. 781.

(c) See further hereon 1 Platt, *Leases*, 371, *et seq.*; Woodf. L. & T. 44, 45, 15th edit.

(d) See *ante*, p. 13; 1 Platt, *Leases*, 37; *Imperial Loan Company v. Stone*, (1892) 1 Q. B. 559; 61 L. J. 449, Q. B.; 66 L. T. Rep. N. S. 556.

surrender any lease, and accept a new lease, &c., and execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends (sect. 120; see also sect. 116). The power to authorise leases of the lunatic's property extends to property of which he is tenant in tail (sect. 122).

The Settled Estates Act, 1877, gives certain powers of leasing over settled estates, as in the Act specified (*ante*, pp. 284, 285), and by sect. 49 all powers given by the Act, and all applications to the court under it, &c., may be executed, and made, &c., by committees on behalf of lunatics; but in the case of a lunatic tenant in tail a special direction is necessary (sect. 49). And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), where a tenant for life, &c., is a lunatic so found by inquisition, his committee may, in his name and behalf, by order of the Lord Chancellor, &c., exercise the powers of a tenant for life under the Act (sect. 62). The decisions bearing on this section have already (*ante* p. 291) been stated.

Drunkards.—Leases made by drunkards stand on much the same footing as leases made by lunatics. A lease made by a person so intoxicated as not to know what he was doing is, like any other contract, voidable by him after becoming sober, or he may ratify it.(a)

Married Women.—At common law leases made by a married woman without the concurrence of her husband, unless in pursuance of an express power, were void.(b) Under an express power, however,(c) or if the lands be settled to her separate use, without any restraint on alienation, she might in equity make a lease of them.(d)

A demise by deed by the husband alone, or by husband and wife, of her freehold lands was binding during their joint lives, but was voidable by the wife on the husband's death.(e)

As to her statutory power of leasing: Under the Fines and Recoveries Abolition Act, 1874 (3 & 4 Will. 4, c. 74), a married woman may, by deed acknowledged, with her husband's concurrence, or without if dispensed with by the Court, make a valid lease of her lands.(f) And, as already fully stated,(g) the Settled Estates Act, 1877, enables a husband, entitled in possession in right of his wife of any settled estates, or entitled to any unsettled estates as tenant by the curtesy, or in right of a wife seized in fee, without any application to the Court, to lease the lands for not more than twenty-one years, subject to the conditions in the Act mentioned (sect. 46).

We have also shown that a married woman who is under the Matrimonial Causes Act, 1857, judicially separated from her husband, or has

(a) *Say v. Barwick*, V. & B. 195; *Mathews v. Baxter*, L. R. 8 Ex. 132; 42 L. J. 73, Ex.; 28 L. T. Rep. N. S. 169; 21 W. R. 389.

(b) 1 Platt, Leases, 48.

(c) Sug. Pow. 153, 154, 8th edit.

(d) *Taylor v. Meads*, 4 De G. J. & S. 597; 34 L. J. 203, Ch.; 12 L. T. Rep. N. S. 6; 13 W. R. 394.

(e) Platt, Leases, 138, *et seq.*

(f) See *ante*, p. 18.

(g) *Ante*, p. 284.

had a protecting order granted, is for the purposes of property and contracts to be considered as a *feme sole*.^(a) So the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), now repealed, appears to have allowed independent demises of unsettled land under sects. 1, 7, and 8. And as previously shown by the Married Women's Property Act, 1882, a married woman, who comes within its provisions, may hold and dispose of her property as if she were a *feme sole*.^(b) And by the Settled Land Act, 1882, as already shown,^(c) certain powers of leasing are given to tenants for life of settled lands, and by sect. 61, where a married woman is entitled for her separate use, or under any statute for her separate property, she, without her husband, has the powers of a tenant for life, and where she is entitled otherwise than aforesaid, she and her husband have such powers; and a restraint on anticipation is not to prevent her exercising any power under the Act.

Traitors and Felons.—We have already shown what powers of alienation a person convicted of treason or felony has over his property, *ante*, p. 23.

Aliens.—As to the powers of an alien over realty, see *ante*, p. 36.

Mortgagor and Mortgagee.—We have already^(d) shown what powers of leasing mortgaged property can be exercised by mortgagors and mortgagees.

Lessees.

As a general rule, all persons may become lessees, but demises to persons under some legal disability are liable to be avoided by them on the disability ceasing.

Corporations.—A corporation, aggregate or sole, may take a lease of lands, but (with certain exceptions) unless the corporation has a licence from the Crown or the authority of some statute to hold lands, the assurance must comply with the provisions of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), already fully set out;^(e) for, by sect. 10, leases are expressly brought within the provisions of the Act.

A lease granted to a corporation aggregate goes to the successors; but in the case of a corporation sole, as a bishop, it goes on his death to his executors in *autre droit*, and not to his successor, unless there be a custom to the contrary.^(f)

By 1 & 2 Vict. c. 106, spiritual persons performing the duties of an ecclesiastical office may not take leases for occupation of more than eighty acres of farming land without the written consent of their bishop; and for terms not exceeding seven years (sect. 28).

Trustees of Charities.—Trustees for charitable uses may take leases of lands; but such leases must be in accordance with the Mortmain and

(a) See *ante*, p. 13.

(c) *Ante*, p. 286.

(e) See *ante*, pp. 2-5.

(b) See *ante*, p. 15.

(d) See *ante*, pp. 194 to 197.

(f) 1 Platt, Leases, 542.

Charitable Uses Act, 1888,(a) unless any lease falls within some of the exceptions made to the Act.(b)

Public Bodies.—By special statutes public bodies established for public or quasi-public purposes may become lessees. Thus leases may be taken of lands or buildings by parish officers on behalf of the inhabitants of the parish;(c) by councils of boroughs, and commissioners of public baths and washhouses for public use;(d) by library authorities under the Public Libraries Act, 1892;(e) by county councils for the purposes of their powers and duties,(f) and for the purpose of letting small holdings;(g) and by district and parish councils under the Allotments Act, 1887, and the Local Government Act, 1894;(h) also by trustees of friendly societies for the use of the society, if their rules so provide.(i) In all these cases the lease must be made subject to the conditions in the particular Act specified.

Trustees Generally.—If a trustee in the administration of his trust takes a lease, he becomes liable thereunder, and the lessor has no remedy against the *cestui que trust*.(k) However, the trustee, if he has acted prudently, is entitled to indemnity out of the trust estate.(l) If a trustee renews a renewable lease in his own name he will be ordered to hold it upon trust for the *cestui que trust* even if the lessor has refused to grant a new lease to the *cestui que trust*.(m) By 56 & 57 Vict. c. 53 trustees of renewable leaseholds may renew the same, and for such purpose may surrender the subsisting lease, and may raise money by mortgage for such renewal, if necessary (s. 19).

Infants.—An infant may take a lease, but he may avoid it on attaining his majority, or within a reasonable time afterwards.(n) But if he avoids the lease he cannot recover any premium he may have paid for it,(o) or, it seems, a sum of money he has paid for the furniture in a house he agreed to take, and occupied, notwithstanding the Infants' Relief Act, 1874.(p)

Although it is at the infants' election to have the lease declared void,

(a) *Bunting v. Sargent*, 13 Ch. Div. 330; 49 L. J. 109, Ch.; 44 L. T. Rep. N. S. 643; 28 W. R. 123.

(b) See *ante*, pp. 4, 5.

(c) 59 Geo. 3, c. 12, s. 12, *et ante*, p. 7.

(d) 9 & 10 Vict. c. 74, s. 27; 45 & 46 Vict. c. 30, ss. 2, 3.

(e) 55 & 56 Vict. c. 53, s. 11.

(f) 51 & 52 Vict. c. 41, s. 65.

(g) 55 & 56 Vict. c. 31, s. 2; *et ante*, p. 296.

(h) 50 & 51 Vict. c. 48, s. 2; 56 & 57 Vict. c. 73, ss. 10 (1), 21, 25; *et ante*, p. 296.

(i) 59 & 60 Vict. c. 25, s. 47.

(k) *Walters v. Northern Coal Co.*, 5 De G. M. & G. 629; 25 L. J. 633, Ch.; *White v. Hunt*, L. R. 5 Ex. 32; 40 L. J. 23, Ex.; 23 L. T. Rep. N. S. 559; *Ramage v. Womack*, (1900) 1 Q. B. 116; 69 L. J. 40, Q. B.; 81 L. T. Rep. N. S. 526.

(l) See Lewin on Trusts, 251, 9th edit.

(m) *Keech v. Sandford*, 1 L. C. Eq. 46, 5th edit.; and see *Longton v. Wilsby*, 76 L. T. Rep. N. S. 770.

(n) 1 Platt, Leases, 528; *Holmes v. Blogg*, 8 Taunt. 35; *et ante*, p. 11.

(o) *Holmes v. Blogg*, *sup.*

(p) *Valentini v. Canali*, 24 Q. B. Div. 166; 59 L. J. 74, Q. B.; 61 L. T. Rep. N. S. 731; 32 W. R. 331.

yet where he obtained a lease by representing himself of full age, the lease was set aside at the instance of the lessor; the latter, however, not being allowed to recover for use and occupation.(a)

By 11 Geo. 4, & 1 Will. 4, c. 65, s. 12, leases to infants may be surrendered and renewed under the direction of the Chancery Division of the High Court.

Lunatics.—A person of unsound mind may take a lease,(b) but it is voidable by him. Where, however, the unsoundness of mind is unknown to the lessor, and no advantage is taken of the lunatic's situation, and he has occupied under the lease, it is binding on him.(c) By 53 & 54 Vict. c. 5, the judge in lunacy may direct the lunatic's committee to surrender any lease and accept a new lease (sects. 116, 120, 124).

Married Women.—At common law a married woman may be a lessee, and the estate vests until the husband signifies his dissent; and she may avoid it after his death.(d) But, as has been already shown, she may, under the Married Women's Property Act, 1882, acquire and hold any property, and may bind her separate estate by her contracts.(e) And, even prior to this Act, a woman living apart from her husband, and having separate estate, might bind it by taking a lease.(f) Leases to married women may, under 11 Geo. 4, & 1 Will. 4, c. 65, s. 12, by direction of the Chancery Division of the High Court, be surrendered and renewed.

Traitors and Felons.—The effect of the statute 33 & 34 Vict. c. 23, on a convict's property has been considered, *ante*, p. 23.

Aliens.—As to an alien being a lessee, see *ante*, p. 36.

Attornment.

It is necessary to notice briefly the law of attornment.

Attornment is the acknowledgment by a tenant, on the grant of the reversion by his landlord to another, to hold of such grantee as new lord.(g) By 4 Anne, c. 16, all grants and conveyances of reversions, &c., of any lands are to be effectual without any attornment of the tenants (sect. 9); but no such tenant is to be prejudiced by payment of rent to the grantor, or by breach of any condition for non-payment thereof, before notice to him of the grant by the grantee (sect. 10). And by 11 Geo. 2, c. 19, s. 11, attornments by tenants to strangers claiming title to the estate of their landlords are null and void, unless made pursuant to some judgment or decree; or made with the privity and consent of their landlords; or to any mortgagee after the mortgage is become forfeited.

(a) *Lempriere v. Lange*, 12 Ch. Div. 675; 41 L. T. Rep. N. S. 378; 32 W. R. 879.

(b) Co. Litt. 2, b.

(c) *Dane v. Kirkwall*, 8 C. & P. 679; and see *ante*, p. 13.

(d) Co. Litt. 3, a; 1 Platt, Leases, 531.

(e) *Ante* pp. 15, 16; see also *post*, tit. "Settlements."

(f) *Gaston v. Frankum*, 2 De G. & Sm. 561; 13 Jur. 739; 16 Jur. 507.

(g) Co. Litt. 309, a.

When a mortgagor himself occupies the property mortgaged, sometimes a clause of attornment by him as tenant to the mortgagee is introduced into the mortgage deed for the purpose of better securing the interest on the loan. The law on this point has, however, been stated *ante*, pp. 207, 208.

An assignee of the reversion, whether on a sale or by way of mortgage, may, after he has given notice of the assignment to the tenant, sue or distrain for rent accruing after the assignment, though not for the antecedent rent.(a) But where a mortgagor leases the property after the mortgage not under the Conveyancing Act, 1881, the mortgagee is not assignee of the reversion, and cannot recover rent from the tenant until he has attorned tenant to him, mere notice by the mortgagee not being sufficient.(b)

An attornment generally estops the party making it from denying the title of the person to whom it is made.(c) A mere memorandum of attornment not creating any new tenancy, or any fresh terms, does not require a stamp, either as a lease or an agreement.(d) Nor, it seems, does an attornment clause in a mortgage deed, constituting the mortgagor tenant to the mortgagee, require to be stamped as a lease in addition to the mortgage stamp.(e)

The Demise.

Having shown who may be lessors and lessees respectively, we now proceed to the next ordinary part of a lease, viz., the *demise*; for it is seldom necessary to insert recitals in a lease, except for the purpose of explaining how it happens that persons other than the lessor and lessee are parties to the lease.(f) Even when the lease is made in execution of a power a recital is unnecessary, but is sometimes inserted.(g)

The usual word by which a lease is made is "demise" or "lease," but *grant*, or any words which express an intention to grant a lease will be equally effectual.(h)

Lease or Agreement.—It was formerly often a matter of considerable importance to decide whether an instrument of contract between landlord and tenant amounted to an actual lease or only to an agreement for a lease; but this is not now of the importance it was formerly. For, as previously stated, the statute 8 & 9 Vict. c. 106, requires leases which the Statute of Frauds required to be by writing to be by deed; and by the

(a) *Moss v. Gallimore*, 1 Sm. L. C. 604, 9th edit.; *Flight v. Bentley*, 7 Sim. 149; 4 L. J. 262, Ch.; *et ante*, p. 196.

(b) *Partington v. Woodcock*, 6 A. & E. 690; *Towerson v. Jackson*, (1891) 2 Q. B. 485; 61 L. J. 36, Q. B.; 65 L. T. Rep. N. S. 332; and see *ante*, pp. 196, 197.

(c) *Woodf. L. & T.* 280, 16th edit.

(d) *Doe v. Edwards*, 5 Ad. & E. 95, 102; *Tilsley on Stamps*, 27, 3rd edit.

(e) *Walker v. Giles*, 18 L. J. 323, C. P.; 13 Jur. 588; *Tilsley on Stamps*, 363, 3rd edit.; *Alpe on Stamps*, 3, 6th edit.

(f) 3 Byth. & Jar. Conv. 128, 4th edit.

(g) 5 David. Conv. 127, pt. 1, 3rd edit.

(h) *Bac. Abr. "Leases" (K.)*; *Duxbury v. Sandiford*, 80 L. T. Rep. 552, C. A.

Stamp Act of 1870, s. 96, the distinction between agreements for leases and actual leases for terms not exceeding thirty-five years, as to the amount of stamp duty, was abolished;(a) and since the decision in *Walsh v. Lonsdale* (stated, *ante*, p. 279) the difference has been further narrowed. However, it must be remembered that the rule in *Walsh v. Lonsdale* only applies to agreements of which the Court will decree specific performance.(b)

Whether an instrument is to be construed as a lease or an agreement depends upon the intention of the parties, to be collected from the instrument itself and the nature of the subject-matter, without reference to any extrinsic circumstances or subsequent acts of the parties.(c) If an instrument contains words of present demise and the terms of a tenancy, a reference therein to a lease to be subsequently drawn up will not reduce the demise to an agreement.(d) But an express stipulation that the instrument should not operate as a lease will prevent its doing so.(e) So, if the tenancy is only to commence on the performance of some condition.(f)

An agreement for a lease though for a less period than three years, must be in writing if it relates to lands, tenements, or hereditaments, or any interest therein, and be signed by the party to be charged or his agent lawfully authorised.(g) We have already (h) given instances of what are interests in land within the above section. And it may be added that an agreement, however short, of letting and hiring furnished houses or lodgings, if the contract gives the party taking a right to any specific apartments, is a contract for an interest in land within the above section.(i) However, a contract to receive a person into a house and provide him with board and lodging generally, not giving him a right to any specific rooms, is not an interest in land, and therefore the contract need not be in writing.(k) But an agreement giving a right to shoot over land and to take away a share of the game is within the section.(l)

A contract for a lease should, like any other contract, contain the whole terms of the agreement, viz. (1) a description of the parties; (2) of the property; and (3) specify the commencement and duration of the term; and (4) the rent or other consideration for the demise; and (5)

(a) Repealed, but re-enacted by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 75, by which the term is "not exceeding thirty-five years, or any indefinite term."

(b) See *ante*, pp. 59, 69, 279; *et post*, p. 307.

(c) *Doe v. Powell*, 7 M. & G. 980; 14 L. J. 5, C. P.; *Curling v. Mills*, 6 M. & G. 173; 12 L. J. 316, C. P.

(d) *Warman v. Faithful*, 5 B. & Ad. 1042; *Chapman v. Bluck*, 4 Bing. N. C. 187.

(e) *Perring v. Brook*, 7 C. & P. 360; 1 M. & Rob. 510.

(f) *Doe v. Clark*, 14 L. J. 233, Q. B.

(g) 29 Car. 2, c. 3, s. 4; *et ante*, pp. 59, 62.

(h) *Ante*, p. 63.

(i) *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 Tyr. 293; 1 C. & J. 391.

(k) *Wright v. Stavert*, 2 Ell. & E. 721; 29 L. J. 161, Q. B.; 8 W. R. 413.

(l) *Webber v. Lee*, 9 Q. B. Div. 315; 51 L. J. 485; 47 L. T. Rep. N. S. 215; 30 W. R. 866.

it should stipulate what covenants and conditions the lease is to contain ; and not merely state that it shall contain the "usual covenants," &c., as this expression has led to frequent disputes as to what covenants the lease is to contain. If the agreement for a lease relating to land does not contain the whole of the terms, specific performance will not be enforced.(a)

Thus, where the agreement does not specify on what day the term is to begin, specific performance will not be decreed unless this can be inferred from the agreement.(b) And subject to certain exceptions the Court will not specifically enforce a contract to build or repair, because such contracts are for the most part so uncertain that the Court could not enforce its own judgment.(c) But where (1) the work to be done is defined, and (2) the plaintiff has a material interest in its execution which cannot be compensated for by damages, and (3) the defendant has obtained from the plaintiff possession of the building land, the Court will assume jurisdiction.(d)

An intended lessee may by his conduct disentitle himself to specific performance, as where he obtains possession under the agreement and does acts which would, if the lease had been granted, amount to a forfeiture ; as where the lease was to contain a covenant to repair, and a power of re-entry on breach thereof, and the tenant neglected to repair(e) ; and the like as to cultivation of the lands in a proper manner.(f) And the rule on which these cases was decided is not affected by the Conveyancing Act, 1881, sect. 14, which enables the Court to grant relief against forfeiture under a proviso in a lease for a breach of a covenant therein, as in fact the above decisions were given since the Act. The sect. speaks only of a "proviso in a lease," and it was therefore held did not apply to an agreement for a lease. Relief could not, it was said, be given till there was a lease, or a right to one according to the doctrine of specific performance.(g) And before the Conveyancing Act, 1892, it was held that if the agreement be one of which the tenant is entitled to specific performance without regard to the Act, he may have such relief upon making compensation according to the section.(h) And by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 5, it is enacted that in sect. 14 of the Act of 1881, "lease" shall include an agreement for a lease where the lessee has become entitled to have the lease granted. Whether this enactment goes beyond the previous law as laid down in the previous decisions is not clear. Further information as to specific performance will be found *ante*, pp. 61, 62, 69.

(a) See *ante*, p. 61.

(b) *Marshall v. Berridge*, 19 Ch. Div. 233 ; 51 L. J. 329, Ch. ; 45 L. T. Rep. N. S. 599 ; 30 W. R. 93 ; *Humphrey v. Conybeare*, 80 L. T. Rep. N. S. 40.

(c) *Paxton v. Newton*, 2 Sm. & Gif. 437 ; Fry, Sp. Perf. 44, 3rd edit.

(d) Fry, Sp. Perf. 46, 3rd edit.

(e) *Swain v. Ayres*, 21 Q. B. Div. 289 ; 57 L. J. 428, Q. B. ; 36 W. R. 798.

(f) *Coatsworth v. Johnson*, 55 L. J. 220, Q. B. ; 54 L. T. Rep. N. S. 250.

(g) *Swain v. Ayres*, *sup.* ; *Coatsworth v. Johnson*, *sup.*

(h) *Strong v. Stringer*, 61 L. T. Rep. N. S. 470 ; W. N. 1889, p. 135.

From the foregoing remarks, it will be seen that it is not advisable for either lessor or lessee to allow their respective rights to depend upon an agreement in the place of a lease, except in special cases, as where the commencement of the term to be granted is postponed, and depends upon the previous completion by either party of something stipulated to be done, and no immediate possession under the demise is contemplated, as where repairs are previously to be executed, or a house to be built upon the premises.(a)

Right to Investigate Lessor's Title.

This subject has already (*ante*, pp. 57, 118) been treated of, and it only remains here to state that before the passing of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2 (extended by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, ss. 3, 13), a person who had agreed to grant a lease could not enforce specific performance thereof without making out and verifying his title in the same way as if he had agreed to sell the fee simple.(b) By the sections in the above statutes, the law was altered to the effect set out *ante*, pp. 57, 58. We will now return to the lease.

The Parcels.

After the demise comes a description of the property demised, which should be clear and precise; but generally anything obviously necessary for the enjoyment of the thing demised will pass with it.(c) Thus, even before the Conveyancing Act, 1881, fixtures passed without any implied obligation to pay for them.(d) So a right of way appurtenant to land passed to the tenant, though nothing was said about it at the time of the demise.(e) And, as already seen(f) by the above Act, general words in a conveyance of land are no longer necessary (sect. 6); and by sect. 2 (v.) of the Act, conveyance, unless a contrary intention appears, includes a lease.

In addition to easements strictly appurtenant to the property demised, such easements as are essential to its due enjoyment, usually termed easements of necessity, will, if there be nothing to negative the presumption, pass to the lessee, over other property retained by the lessor.(g) For instance, an absolutely necessary right of drainage;(h) or of way.(i) A lease of rooms on a floor is a lease of a separate dwelling, and includes the outer wall so far as it is solely appropriate to the rooms let.(k)

(a) 5 David. Conv. 18, pt. 1, 3rd edit.

(b) Per Lindley, L. J., in *Jones v. Watts*, 43 Ch. Div. 574; 62 L. T. Rep. N. S. 471; 38 W. R. 725.

(c) Foà, L. & T. 65, 2nd edit.

(d) *Goff v. Harris*, 5 M. & G. 573.

(e) *Skull v. Glenister*, 33 L. J. 185, C. P.; 9 L. T. Rep. N. S. 763; 12 W. R. 554.

(f) *Ante*, p. 132.

(g) See *ante*, p. 133.

(h) *Ewart v. Cochrane*, 4 Macq. 117; 5 L. T. Rep. N. S. 1; 10 W. R. 3.

(i) *Gayford v. Moffatt*, 4 Ch. App. 133.

(k) *Carlisle Café Co. v. Muse*, 67 L. J. 53, Ch.; 77 L. T. Rep. N. S. 515.

For more detailed information as to the parcels, general words, and the meaning of particular words, see *ante*, pp. 129-133.

Exceptions and Reservations.—If the demise is made subject to any exceptions or reservations in favour of the lessor, they usually follow the grant of the parcels. The distinction between an exception and a reservation, and the general requisites as to each, have already been pointed out.(a)

The usual exceptions in a lease are of woods and trees, mines, and minerals. Where anything is excepted, all things that are dependent upon it and necessary for the obtaining of it, are excepted also; as where trees are excepted this gives a right to the lessor to go upon the land to cut the trees,(b) or if minerals are excepted a right to work the minerals.(c) An exception of "all trees," &c., will not include fruit trees.(d)

An exception of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context, or in the nature of the transaction to cause the Court to give it a more limited meaning.(e) However, a substance may be profitable at one time and not at another, but that does not make it the less a mineral.(f)

The lease should expressly stipulate as to whether, in working the minerals excepted, a compensation is to be paid or not for any injuries done to the surface. Still, in the absence of such stipulation, a presumption arises that the lessee is entitled to a right of support to the surface in working the minerals.(g)

Express reservations in favour of the lessor are usually either of *profits à prendre*, as for instance, a right of shooting or fishing; or of *easements*, as a right of way; and operate as a re-grant by the lessee to the lessor of the right in question.(h) As these are incorporeal hereditaments they must be created by deed; therefore the reservation of such rights must be in a lease under seal.(i) However, for the purposes of the Game Act (1 & 2 Will. 4, c. 32) it seems that in a parol demise there may be a parol reservation of the game.(k) But there must be an actual reservation, a mere agreement by the tenant not to kill the game but to preserve it is not sufficient.(l)

(a) *Ante*, p. 134. (b) *Shep. Touch.* 100; *Redm. & Ly. L. & T.* 62, 2nd edit.

(c) *Proud v. Bates*, 34 L. J. 406, Ch. (d) *Wyndam v. Way*, 4 Taunt. 316.

(e) *Hext v. Gill*, L. R. 7 Ch. App. 699, 712; 41 L. J. 761, Ch.; 27 L. T. Rep. N. S. 291; 20 W. R. 957.

(f) *Johnstone v. Crompton*, 68 L. J. 559, 562, Ch.; 47 W. R. 604; 81 L. T. Rep. N. S. 165; (1899) 2 Ch. 190.

(g) *Davis v. Treharne*, 6 App. Cas. 460, 466; 50 L. J. 665, Q. B.; 29 W. R. 869.

(h) 3 Byth. & Jar. Conv. 133, 4th edit.; *Durham, &c. Ry. Co. v. Walker*, 2 Q. B. 940; 11 L. J. 442, Ex.

(i) *Bird v. Higginson*, 6 A. & E. 824; *Adams v. Clutterbuck*, 10 Q. B. Div. 403 52 L. J. 607, Q. B.; 48 L. T. Rep. N. S. 614; 31 W. R. 723.

(k) Sect. 8; *Coleman v. Bathurst*, L. R., 6 Q. B. 366; 40 L. J., 131, M. C.; 24 L. T. Rep. N. S. 426; 19 W. R. 848.

(l) *Coleman v. Bathurst*, *sup.*

By the Ground Game Act, 1880^(a) (an Act for the protection of occupiers of land against injury to their crops from ground game), the occupier of land is entitled—as incident to, and inseparable from, his occupation—to the right to kill and take ground game thereon concurrently with any other person having such right (sect. 1). Such other person would be usually the landowner under a reservation. The occupier may also authorise in writing one other person to kill and take ground game with firearms; but such a person must be a member of his household resident on the land, or a person in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game. Such person is bound to produce his authority when demanded by the person having a concurrent right to take and kill ground game, or his agent authorised by writing, otherwise he will not be deemed to be an authorised person. But a person is not to be deemed an occupier of land by having a right of common over such lands, or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses for not more than nine months; and in the case of moorlands and uninclosed lands (not being arable lands) the rights are only to be exercised from the 11th December to 31st March,^(b) both inclusive; but this is not to apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where they are less than twenty-five acres in extent (sub-sects. 1–3). Sect. 2 contains a saving of existing rights in the occupier; and by sect. 3 every agreement, &c., which purports to divest or alienate the right of the occupier as declared by the Act is void. Sect. 5 contains a saving for leases, &c., existing at the date of the passing of the Act, giving the right to kill and take ground game to some person other than the occupier; also where a person other than the landlord, &c., has a right of killing and taking ground game before the passing of the Act by virtue of any franchise, charter, or Act of Parliament.

By sect. 8 ground game means hares and rabbits.

Where an owner of land granted the exclusive right of sporting to B. and then sold the land to C., who entered into possession and trapped the rabbits thereon, it was held in an action by B. that C. might so trap the rabbits as occupier.^(c)

The Habendum and Term.

After the exceptions and reservations, if any, the *habendum* follows, which should state with certainty the commencement and duration of the term. As to the commencement, a lease for years may be made to commence either at a present or at a future date.^(d) So the period from

(a) 43 & 44 Vict. c. 47.

(b) By 55 & 56 Vict. c. 8, the months of March, April, May, June, and July are a close time for the sale of hares.

(c) *Anderson v. Vicary*, (1899) 2 Q. B. 437; 68 L. J. 970, Q. B.; 81 L. T. Rep. N. S. 358.

(d) 2 Platt, Leases, 50, 52.

which the term may be computed may be a past day, as in a lease dated the 19th July, 1851, "to hold from the 25th December, 1849, for the term of fourteen years.(a) But the interest and liability under such a lease only commence from its delivery.(b)

Where the *habendum* is from the date or from the day of the date, that day is included or not in the term according to the intention of the parties gathered from the context.(c) The tendency of the Courts would seem to lean towards excluding that day.(d) Clearly where a lease is to commence from a given date, as the 25th March, the term does not end until the last moment on the 25th March in the last year.(e) But where the demise is for years, or from year to year "to commence on" a given day, the term expires in the year in which it comes to an end, at midnight on the day before the given day.(f) Further information as to the time from which deeds operate will be found, *ante*, p. 123.

The duration of the term must also be made certain, either by express words in the lease or by reference to some collateral act which may with equal certainty measure the continuance of it, otherwise the lease is void. Thus a lease for so many years as A. shall live is void as a lease for years, as the number of years is uncertain; but a lease for twenty-one years, if A. shall so long live, is good;(g) the maxim being *id certum est quod certum reddi potest*.(h)

The rule which requires the term to be stated with certainty does not apply to a lease or estate for life; for such an estate may be given in general terms. Thus, a grant by A. to B. of the Manor of Dale, gives B. an estate for his life.(i) A lease for life may be made either for the life of the lessee or grantee, or during the life of another; and by 6 Anne, c. 18, provision is made for compelling the production of the *cestui que vie* upon the application of the lessor who has reason to believe that the *cestui que vie* is dead.

We have already seen that a lease cannot be made in perpetuity save under the authority of some statute.(k) The duration of certain other specified tenancies has also been stated.(l)

In leases for a given period, as for twenty-one years, it is usually provided that the lease may be determined at the end of the first seven or fourteen years. It should be stated with precision whether this power may be exercised by either lessor or lessee, for, if the lease is silent on the

(a) *Bird v. Baker*, 1 E. & E. 12; 28 L. J. 7, Q. B.

(b) *Shaw v. Kay*, 1 Ex. 412; 17 L. J. 17, Ex.; *Jervix v. Tomkinson*, 1 H. & N. 195; 26 L. J. 41, Ex. (c) *Pugh v. Duke of Leeds*, Cow. 714.

(d) See 5 David. Conv. 31, pt. 1, 3rd edit.

(e) *Ackland v. Lutley*, 9 A. & E. 879.

(f) *Sidebotham v. Holland*, (1895) 1 Q. B. 378; 64 L. J. 200, Q. B.; 72 L. T. Rep. N. S. 62; 43 W. R. 228.

(g) Bac. Abr. "Leases" (L. 3); Shep. Touch. 275; 2 Platt, Leases, 50, 69.

(h) Shep. Touch. 274, 275; Platt, *sup*.

(i) Co. Lit. 42 a., 183 a.; 2 Bl. Com. 121.

(k) *Ante*, p. 282.

(l) *Ante*, p. 279.

point, the lessee alone has the right.(a) On the tenant's part it is usually made conditional on his having paid the rent and performed his covenants.(b) If each party is to have the power it should be reserved to the lessee, his executors, administrators, or assigns, and to the lessor, his heirs or assigns if the reversion be a freehold, or to him, his executors, &c., if a leasehold for years.(c) But it seems, though the power be inaccurately reserved in this respect, and though assigns be not mentioned, it will run with the land, both as to the reversion and the term.(d) When the lease was made determinable at the end of seven or fourteen years, "if the parties so think fit," it was held that the lease could not be determined without the assent of both lessor and lessee.(e)

Where there have been several assignments of the lease the notice must be given by the assignee in whom at the time of giving the notice the term is vested.(f) If the lease provides for a written notice, a verbal notice is not sufficient.(g)

The Reddendum.

After the *habendum* the *reddendum* follows, and should properly define (1) the amount of the rent, (2) to whom, (3) at what times, and (4) how payable. The usual words used are "yielding and paying," but any words showing an intention that a certain rent shall be paid are sufficient; as a covenant by the lessee to pay an annual rent of a certain amount.(h) The words "yielding and paying" in a lease by deed executed by both parties create an implied covenant for payment of rent.(i)

Rent has the following incidents:—(1) it must be certain, or be capable of being made certain. And rent is certain if by calculation and upon the happening of certain events it becomes certain, and the mere fact of a rent being fluctuating does not make it uncertain.(k) And the time at which it is payable must be certain also.(l) Though rent usually consists of money, this is not necessary; it may be rendered in specific articles; but part of the profits demised, as the herbage or vesture, cannot be reserved.(m) Yet payments reserved on the working of mines or brick fields may be rent.(n)

(a) *Powell v. Smith*, L. R. 14 Eq. 85; 41 L. J. 734 Ch.; 26 L. T. Rep. N. S. 754; 20 W. R. 602; 15 David. Conv. 341, pt. 1, 3rd edit.

(b) See *Grey v. Friar*, 4 H. L. Cas. 565. (c) See 5 David. Conv. 341, pt. 1, 3rd edit.

(d) *Roe v. Hayley*, 12 East, 464; David. Conv. *sup.*

(e) *Fowell v. Tranter*, 3 H. & C. 458; 34 L. J. 6, Ex.; 11 L. T. Rep. N. S. 317; 13 W. R. 145.

(f) *Seaward v. Drew*, 78 L. T. Rep. N. S. 19; 67 L. J. 322, Ch.

(g) *Legg v. Benion*, Willes. 43.

(h) Woodf. L. & T. 405, 15th edit.; 3 Byth. & Jar. Conv. 143, 4th edit.

(i) *Iggulden v. May*, 9 Ves. 360; 2 Platt, Leases, 87.

(k) *Ex parte Voisey*, 21 Ch. Div. 442, 458; 52 L. J. 121, Ch.; 47 L. T. Rep. N. S. 362; 31 W. R. 19.

(l) Woodf. L. & T. 405, 15th edit.

(m) 2 Bl. Com. 41; 2 Platt, Leases, 100.

(n) *Edmonds v. Eastwood*, 27 L. J. 209, Ex.; *Gowan v. Christie*, L. R. 2 Ho. L. Sc. App. 273.

(2) As a general rule, rent cannot be reserved out of an incorporeal hereditament, as a common or market, at least so as to give a right of distress at common law; (a) nor out of chattels, and where land and chattels are demised at one entire rent, the rent issues out of the land exclusively. (b)

(3) Rent must be reserved to the lessor and not to a stranger; and be made to follow the reversion. (c) However, if reserved generally without saying to whom, the law will carry it to the owner of the reversion after the lessor's death, that is, to his heir if he was seised in fee (subject to the right of the real representative under the Land Transfer Act, 1897, ss. 1 to 5, stated *ante*, p. 29), and to his executor or administrator, if possessed of a term. (d) And by the Conveyancing Act, 1881, rent reserved by a lease, made after the commencement of the Act, is to be annexed and incident to, and go with the reversion immediately expectant on the term, and be recoverable by the person entitled, subject to the term, to the income of the land leased. (e)

Although in the majority of cases one entire rent is made payable for the whole property, yet where it consists of two or more parcels, a separate rent may be reserved in respect of each, (f) which may be made payable at different times. (g)

Time of Payment.—The times of payment should be specified, for if a yearly rent be reserved generally, it will be payable yearly, and cannot be demanded before the end of the year; (h) unless it can be shown by the contemporaneous or subsequent dealings of the parties that it was their understanding that it should be payable otherwise. (i)

Where the reservation is half-yearly or quarterly, without reference to any specified days, the half-yearly or quarterly days are computed according to the *habendum*; but if special days are limited by the *reddendum*, the payments are regulated by it. (k) Rent may be reserved payable in advance, but if this is intended it should be clearly expressed as applying to all the payments during the term, otherwise it may be confined to the first payment only of the rent. (l) However, where rent was reserved quarterly on the usual quarter days, "and always if required a quarter in advance," it was held that the rent was always due

(a) Co. Lit. 47, a.; 2 Platt, Leases, 86.

(b) See 5 David. Conv. 31, pt. 1. 3rd edit.; *Selby v. Greaves*, L. R. 3 C. P. 594; 37 L. J. 251, C. P.; 19 L. T. Rep. N. S. 186; 16 W. R. 1127; *Marshall v. Scholefield*, 52 L. J. 58, Q. B.; 47 L. T. Rep. N. S. 406; 31 W. R. 134.

(c) 2 Platt, Leases, 88.

(d) *Whitlock's Case*, 8 Co. Rep. 71, a.; 2 Platt, Leases, 88; Woodf. L. & T. 385, 13th edit.

(e) Sect. 10; see also 8 & 9 Vict. c. 106, s. 5; *et ante*, p. 138.

(f) 2 Platt, Leases, 104.

(g) *Coomber v. Howard*, 1 C. B. 440; 2 Platt, Leases, 113.

(h) *Collett v. Curling*, 10 Q. B. 785; 16 L. J. 390, Q. B.

(i) *Gore v. Lloyd*, 12 M. & W. 463; 13 L. J. 366, Ex.

(k) 2 Platt, Leases, 113; *Hutchins v. Scott*, 2 M. & W. 809.

(l) *Holland v. Palser*, 2 Stark. 161.

in advance, whether demanded or not, but that non-payment thereof could not be enforced until after demand made.(a) Sometimes the last quarter's rent only is made payable in advance, and this enables the landlord to distrain for the rent before the determination of the tenancy.(b)

It appears that rent is due on the morning of the day appointed for payment, but is not in *arrear* until such day has elapsed.(c) Formerly it was held that it was not due till midnight on the day on which it was made payable.(d) But the distinction on this point, so far as regards the right to rent between the heir and personal representatives of a lessor dying on the rent day has been rendered unimportant by the Apportionment Act (33 & 34 Vict. c. 35) to be referred to subsequently.

If any suspension or abatement of rent is to take place in case of the total or partial destruction of the premises demised by fire or other accident, the terms thereof should be specified, for otherwise the tenant covenanting without any exception to pay the rent would be liable to pay it although the premises were uninhabitable by reason of fire, even if the landlord had insured the premises and received the insurance money,(e) or if they are otherwise destroyed.(f)

And it should be stated whether the payment is to be free from all deductions, or whether any taxes or rates are to be excepted; but this subject will be more fully noticed subsequently.

Where Rent Payable.—Except where the Crown is lessor, rent, unless otherwise provided, is payable upon the land, and at common law no forfeiture is worked by non-payment unless there demanded on the day when it becomes due;(g) but where the lessee has entered into an express covenant to pay the rent, no place being mentioned, it is no answer to an action on the covenant that the rent was not demanded upon the land.(h)

How Payable.—If the rent is reserved in money it may be paid in the same manner as any other debt; i.e., in silver, gold, or Bank of England notes. Payment by cheque amounts to a conditional payment.(i)

As a general rule, where there is a discrepancy between the *habendum* and the *reddendum*, the *habendum* prevails;(k) but where the *habendum* is clearly shown by the counterpart of the lease to contain a clerical error,

(a) *London and Westminster Loan Co. v. London and N.W. Ry. Co.*, (1893) 2 Q. B. 49; 62 L. J. 370, Q. B.; 69 L. T. Rep. N. S. 320; 41 W. R. 670.

(b) *Witty v. Williams*, 10 L. T. Rep. N. S. 457; 12 W. R. 755.

(c) *Dibble v. Bowater*, 2 E. & B. 564; 22 L. J. 396, Q. B.

(d) *Redm. & Ly. L. & T.* 266, 4th edit.

(e) *Monk v. Cooper*, 2 Str. 763; *Leeds v. Cheetham*, 1 Sim. 146; *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J. 168, Q. B. But see 14 Geo. 3, c. 78, s. 83, stated *ante*, p. 54; *et post*.

(f) *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507; 49 L. J. 809, C. P.; 43 L. T. Rep. N. S. 476; 20 W. R. 354; *Saner v. Bilton*, 7 Ch. Div. 815; 47 L. J. 267, Ch.; 38 L. T. Rep. N. S. 281; 26 W. R. 304.

(g) *Doe v. Wandlass*, 7 T. B. 117; 2 Platt, Leases, 100, 341.

(h) *Haldane v. Johnson*, 8 Ex. 689; 22 L. J. 264, Ex.

(i) *Woodf. L. & T.* 422, 423, 15th edit.; *Redm. & Ly. L. & T.* 266, 4th edit.

(k) *Shep. Touch.* 52; *Woodf. L. & T.* 154, 16th edit.

the rule will be rejected;(a) although generally where the lease and counterpart differ the lease prevails.(b)

The Covenants.

After the *reddendum* the covenants follow. We have already(c) treated of covenants as applicable to purchase deeds, and it will there be seen that covenants may be either express or implied; and as regards leases it has been shown that the words "yielding and paying" imply a covenant to pay rent;(d) and other instances of implied covenants will be given subsequently. So, as already stated,(e) covenants may be also joint and several.

Although in preparing express covenants it is prudent to adhere to the forms which practice has sanctioned, yet no particular words are necessary to constitute a covenant; if the intention of the parties can be collected from the document, that is sufficient. Thus, the words "and the lessee shall repair," &c., inserted in a lease under seal constitute a covenant to repair.(f)

Usual Covenants.—If the lease is preceded by an agreement which provides that the lease shall contain "usual covenants," or, what is the same thing, is an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the covenants which the lessee can be called upon to enter into: (1) to pay rent; (2) to pay taxes except such as are expressly payable by the landlord; (3) to keep and deliver up the premises in repair; and (4) to allow the lessor to enter and view the state of repair. The lessor can only be compelled to enter into the usual qualified covenant for quiet enjoyment by the lessee.(g)

The special circumstances above referred to mean peculiar to a particular trade; as, for example, in leases of public-houses, where the brewers have their own forms of leases, the "usual covenants" would mean the covenants always inserted on the leases of certain brewers.(h) So in regard to agreements for farming leases the custom of the country where the property is situate, if any, may be taken into consideration in inserting the covenants in the lease.(i)

Custom has sanctioned the insertion in leases of covenants which cannot be considered as "usual." Thus the covenant to insure, though one generally inserted, does not, it seems, come within the term "usual

(a) *Burchell v. Clark*, 2 C. P. Div. 88; 46 L. J. 115, C. P.; 35 L. T. Rep. N. S. 690; 25 W. R. 334.

(b) *Shep. Touch.* 52, 53.

(c) *Ante*, p. 138.

(d) *Ante*, p. 312.

(e) *Ante*, p. 139.

(f) *Brett v. Cumberland*, 1 Rol. Abr. 518; *Brookes v. Drysdale*, 3 C. P. Div. 52; 37 L. T. Rep. N. S. 467; Byth. and Jar. 183, 4th edit.

(g) *Hampshire v. Wickens*, 7 Ch. Div. 555; 47 L. J. 243, Ch.; 38 L. T. Rep. N. S. 408; 26 W. R. 491; and see 5 David. Conv. 53, pt. 1, 3rd edit.

(h) *Hampshire v. Wickens*, sup.

(i) *Bell v. Barchard*, 16 Beav. 8; 21 L. J. 411, Ch.

covenants.”(a) On the other hand, the exception sometimes introduced into the covenant to repair by the tenant that he shall not do so in case of fire, is not usual and cannot be insisted on.(b)

A covenant restraining the lessee from carrying on any trade without the licence of the lessor, is not usual.(c) And if one special trade be mentioned that will not include other trades.(d)

A covenant not to assign or underlet without the licence of the lessor is not usual;(e) even in the case of a public house;(f) nor does an agreement for a lease of a mine, to contain “usual mining clauses,” entitle the lessor to insert such a covenant in the lease.(g)

And under an agreement for a lease to contain all usual and customary clauses, the lessor is not entitled to have inserted in the lease a proviso for re-entry on breach of any other covenant than the covenant for payment of rent.(h) And the law on this point has not been altered by sect. 14 of the Conveyancing Act, 1881, which provides for relief against forfeiture on breach of the conditions there specified.(i)

In case of dispute between lessor and lessee as to the terms of the lease according to any written agreement that may have been entered into between them, a summons may be taken out under the Vendor and Purchaser Act, 1874,(k) to settle such question.(l)

Covenant to Pay Rent.

In addition to the *reddendum*, a lease should contain an express covenant by the lessee to pay the rent specified, for although the words “yielding and paying” imply a covenant to pay rent, and give an action of debt and a power to distrain, yet this implied covenant does not bind the lessee after he has assigned the lease with the lessor’s assent, express or implied; whereas if there be an express covenant the lessor can bring either debt or covenant as well as distrain; and the lessee continues liable on his covenant after he has assigned the lease, even with the lessor’s assent.(m) The express covenant is brief, being that the lessee will pay the yearly rent reserved at the times and in manner before appointed.

(a) See 5 David. Conv. 53, pt. 1, 3rd edit. ; 2 Platt, Leases, 220.

(b) *Sharp v. Milligan*, 23 Beav. 419. (c) *Proper v. Parker*, 3 Myl. & K. 280.

(d) *Van v. Corpe*, 3 Mgl. and K. 269; *Wilbraham v. Livesey*, 18 Beav. 206.

(e) *Hampshire v. Wickens*, sup. p. 315.

(f) *Henderson v. Hay*, 3 Bro. C.C. 632; *Re Lander and Bagley*, (1892) 3 Ch. 41; 61 L. J. 707, Ch.; 67 L. T. Rep. N. S. 521.

(g) *Hodgkinson v. Crow*, L. R. 19 Eq. 591; 10 Ch. App. 622; 44 L. J. 238, 680, Ch.; 33 L. T. Rep. N. S. 388; 23 W. R. 885.

(h) *Hodgkinson v. Crow*, 10 Ch. App. 622.

(i) *Re Anderton and Milner*, 45 Ch. Div. 476; 59 L. J. 765, Ch.; 63 L. T. Rep. N. S. 332; 39 W. R. 44.

(k) Stated ante, p. 69.

(l) *Re Anderton and Milner*, sup. : *Re Lander and Bagley*, sup. ; and see R. S. C. Ord. 54 A.

(m) See 2 Platt, Leases, 87, 355; Woodf. L. & T. 440, 566, 15th edit.

Additional Rents.—In some leases, chiefly in agricultural leases, the lessee has hitherto entered into covenants not to do certain acts, *ex. gr.*, not to plough up permanent pasture, and if he does to pay a specified additional rent per acre; in such a case the rent is considered as stipulated damages, and equity has no jurisdiction.^(a) So, if he should covenant not to sow more than a given quantity of the land with a particular seed;^(b) or should not take certain crops without manuring under a similar additional rent in each case, the like result follows.^(c) But in these cases the lessee's covenant being not to do the act, and if he does to pay the additional rent, the Court will not grant an injunction against the commission of the act, for the parties themselves have agreed as to the act and its price.^(d) However, it seems that where there is an absolute covenant against a particular act, with a payment reserved by way of penalty for breach thereof, the lessee may be restrained from doing the act.^(e) The additional rent may be recovered by distress.^(f) If, however, the sum payable is not rent or liquidated damages, but in the nature of a penalty, that sum cannot be recovered as rent, but the amount of damages actually sustained must be ascertained, and that sum only is payable. And the use of the word penalty in the lease is not the test to determine whether the amount is a penalty or liquidated damages.^(g)

And now by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), with the exception of a covenant against breaking up permanent pasture, grubbing underwoods, or felling or lopping trees, or regulating the burning of heather, notwithstanding any contract for the payment of a higher rent or other liquidated damages for breach of a covenant, a landlord is not to be entitled to recover by distress or otherwise any sum for the breach in excess of the damage actually sustained (sect. 6). This Act comes into operation 1st January, 1901 (sect. 13).

Recovery of Rent.

Rent may be recovered by distress or by action; and first as to distress: Whenever there is (1) a rent certain^(h) in arrear, (2) arising upon an actual subsisting demise, express or implied, of corporeal hereditaments,⁽ⁱ⁾ in which the lessor has a reversion, (3) payable at a time certain, the common law gives to such lessor a power of distress for the recovery of such rent.^(k) Although there must be an existing demise,

(a) *Rolfe v. Peterson*, 2 Bro. P. C. 436.

(b) *Jones v. Green*, 3 Y. & J. 298.

(c) *Bowers v. Nizon*, 12 Q. B. 558; 18 L. J. 35, Q. B.

(d) *Woodward v. Gyles*, 2 Vern. 119.

(e) *London (City of) v. Pugh*, 4 Bro. P. C. 395; *French v. Macale*, 2 Dr. & W. (Ir.) 269; *Weston v. Metropolitan Asylum District*, 8 Q. B. Div. 387; 9 *Id.*, 404; 51 L. J. 399, Q. B.; 46 L. T. Rep. N. S. 580; 30 W. R. 623.

(f) *Roulston v. Clarke*, 2 H. Bl. 563; *Polhit v. Forest*, 11 Q. B. 949; 16 L. J. 424, Q. B.

(g) *Elphinstone v. Monkland Iron Co.*, 11 App. Cas. 832; 35 W. R. 17.

(h) See *ante*, p. 312.

(i) See *ante*, p. 313.

(k) See Woodf. L. & T. 440, 446, 15th edit.; Redm. & Ly. L. & T. 285, 288, 4th edit.

it should be remembered that if a tenant enters under an agreement for a lease, which can be specifically enforced, and he pays rent thereunder, the landlord has a power to distrain.^(a) Still, when the tenancy ends, the common law right of distress is gone.^(b) Therefore, the landlord cannot distrain upon a tenant who holds over after notice to quit, without some evidence of a renewal of the tenancy.^(c)

The tenant may make the following deductions from his rent: (1) Payment of a ground rent made by him to the superior landlord to prevent his own goods being distrained.^(d) (2) Payment of an annuity secured on the premises, and enforceable by distress.^(e) (3) Payment, after notice, of rent to a mortgagee.^(f) (4) Payment of the landlord's property tax;^(g) (5) or of tithe rentcharge;^(h) or of the land tax, unless in this instance it is otherwise stipulated.⁽ⁱ⁾ (6) The sewers rate in some cases.^(k) And by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 47, where compensation due thereunder, or under any custom or contract, has been ascertained, the amount of it may be set off against any rent due, and the landlord can only distrain for the balance.

However, the liability to pay rates and taxes will be more fully detailed in subsequent pages of this chapter.

Who may distrain.—In order that the landlord may, without express agreement, have a right to distrain, he must at the time of the distress have the reversion in himself. But a legal reversion is not necessary in every case; a reversion by estoppel may be sufficient.^(l) And, as already seen, by the Conveyancing Act, 1881, rent reserved by a lease made after the commencement of the Act may be recovered by the person entitled, subject to the term, to the income of the land leased (sect. 10). If the lessor assign his reversion he loses his right to distrain for rent which accrued due after the assignment;^(m) on the other hand, the assignee has no claim to rent which accrued due before the assignment, for it had become severed from the reversion.⁽ⁿ⁾

Mortgagees and Mortgagors.—It has already (*ante*, p. 196) been shown in what cases and to what extent a mortgagee is entitled to rent under a lease granted by the mortgagor, either before or after the Conveyancing Act, 1881; and when he is so entitled he may recover the rent by distress.^(o) Irrespective of statutory power, if a person, having granted a

(a) *Walsh v. Lonsdale*, 21 Ch. Div. 9, stated *ante*, p. 279.

(b) Co. Litt. 47 b.

(c) *Jenner v. Clegg*, 1 M. & Rob. 213.

(d) *Carter v. Carter*, 5 Bing. 406.

(e) *Taylor v. Zamira*, 6 Taunt. 524.

(f) *Johnson v. Jones*, 9 A. & E. 809; *Underhay v. Reed*, 20 Q. B. Div. 209; 57 L. J. 129, Q. B.; 58 L. T. Rep. N. S. 457; 36 W. R. 203.

(g) 5 & 6 Vict. c. 35, ss. 73, 103; *et post*.

(h) 6 & 7 Will. 4, c. 71, ss. 67, 80, 81; 54 Vict. c. 8; *et post*.

(i) 38 Geo. 3, c. 5, ss. 17, 18, 35; *et post*.

(k) *Palmer v. Eairth*, 14 M. & W. 428.

(l) *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. 81, Q. B.; 18 L. T. Rep. N. S. 791; 17 W. R. 414; *et ante*, p. 282.

(m) *Harmer v. Bean*, 3 C. & K. 307.

(n) *Flight v. Bentley*, 7 Sim. 149.

(o) See *ante*, pp. 196, 197.

lease of premises, afterwards mortgages them, he cannot distrain, as his privity of estate with the tenant is thereby destroyed. But if he is permitted by the mortgagee to continue in possession, he may authorise a distress as agent of the mortgagee.(a) And by 36 & 37 Vict. c. 66, s. 25, a mortgagor entitled for the time being to the possession or receipt of the rents of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents, has been given by the mortgagee, may sue for the recovery of such rents (sub-sect. 5). And as a lease by the mortgagor after the mortgage is good between him and his tenant he may distrain for rent, unless the mortgagee has given notice to the tenant to pay the rent to him.(b)

Executors and Administrators of a lessor for years or at will may, by 3 & 4 Will. 4, c. 42, distrain for arrears of rent due to such lessor in his lifetime (sect. 37). And by sect. 38 such arrears may be distrained for after the determination of the tenancy; provided such distress be made within six calendar months from such determination, and during the continuance of the possession of the tenant from whom such arrears became due. An executor may distrain before probate.(c)

Joint Owners.—Joint tenants holding by one and the same title should join in distraining; however, one may sign a warrant of distress and appoint a bailiff to distrain on behalf of all, if the others do not forbid him.(d)

Tenants in common, from the nature of their title, may distrain each for his own share of the rent.(e)

Coparceners make but one heir, and should therefore join in distraining; still one may distrain on behalf of all, without an express authority from the other coparceners.(f)

Married Women.—At common law a married woman cannot distrain, but her husband may do so during her life, whether her reversion be leasehold or freehold;(g) and by statute he may distrain after her death for rent accrued in her lifetime in respect of her freeholds.(h) Now, however, as to married women coming within the provisions of the Married Women's Property Act, 1882,(i) they may distrain in their own name under the provisions of that statute. A husband, as tenant by the curtesy, may distrain.(k)

Guardians.—Such guardians as may make leases of an infant's lands in their own names during the minority of their wards,(l) may distrain for the rent in their own names.(m)

(a) *Trent v. Hunt*, 9 Ex. 14; 22 L. J. 318, Ex.; *Reece v. Strousberg*, 54 L. T. Rep. N. S. 133.

(b) *Alchorn v. Gomme*, 2 Bing. 54.

(c) *Whitehead v. Taylor*, 10 A. & E. 210.

(d) *Robinson v. Hofman*, 4 Bing. 562.

(e) *Whiteley v. Roberts*, M'Clel. & Y. 107.

(f) *Leigh v. Shepherd*, 2 B. & B. 465; Woodf. L. & T. 456, 16th edit.

(g) Woodf. L. & T. 456, 15th edit.; Redm. & Ly. L. & T. 291, 4th edit.

(h) 32 Hen. 8, c. 37, s. 3.

(i) See *ante*, p. 15.

(k) Woodf. L. & T. 452, 15th edit.

(l) *Ante*, p. 300.

(m) Woodf. L. & T. 454, 15th edit.

Remedy by Action.—In addition to the remedy by distress a landlord has a remedy by action; and if he has distrained and the distress is not sufficient to satisfy the rent, he may proceed by action to recover the residue; but before he can bring his action he must first realise the distress by sale.(a) If the lease is by deed an action will lie on the covenant to pay rent. If the tenancy does not arise under a deed, but there has been occupation of the premises by the tenant, an action for use and occupation may be brought by the landlord.(b)

What Arrears Recoverable.—By 3 & 4 Will. 4, c. 27, s. 42, no arrears of rent can be recovered by distress or action, but within six years next after the same shall have become due, or after a written acknowledgment thereof; and by 3 & 4 Will. 4, c. 42, all actions of debt, &c., for rent reserved by an indenture of demise must be brought within twenty years after the cause of action accrued (sect. 3), or twenty years after a written acknowledgment, or part payment, except in case of disability (sect. 5). The construction of the two enactments taken together is that no more than six years' arrears of rent can be recovered by distress or action under a demise not under seal, but where the demise is under seal containing a covenant to pay rent, twenty years' arrears may be recovered against the covenantor by action.(c) And it seems that the 37 & 38 Vict. c. 57, which provides that no action to recover any money charged upon or payable out of any land or rent can be brought, but within twelve years next after the right accrued (sect. 8), has not altered the law as above stated.(d) And it had been decided on the construction of 3 & 4 Will. 4, c. 27, s. 2, that it did not apply to a rent reserved upon a demise.(e) Indeed, so long as the relationship of landlord and tenant subsists the right of the landlord to rent is not barred by non-payment, for however long, save that by sect. 42 of 3 & 4 Will. 4, c. 27, the amount of arrears recoverable is limited to six years.(f)

Under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), the landlord entitled to rent of a holding to which the Act applies cannot distrain for rent which became due more than one year before the making of the distress; provided that where by the ordinary course of dealing between the landlord and tenant the payment of rent has been allowed to be deferred until the expiration of a quarter or half year after the date when legally due, then it shall be deemed to have become due at the expiration of such quarter or half year, and not when legally due (sect. 44). It will be observed that the section does not enact that a landlord shall not distrain for more than a year's rent at a time, but only

(a) *Lehaine v. Philpott*, L. R. 10 Ex. 242; 44 L. J. 225, Ex.; 33 L. T. Rep. N. S. 98; 23 W. R. 876.

(b) See 11 Geo. 2, c. 19, s. 14; Woodf. L. & T. 560, 567, 15th edit.

(c) *Hunter v. Nockolds*, 1 Mac. & G. 640; 19 L. J. 177, Ch.

(d) *Darley v. Tenant*, 53 L. T. Rep. N. S. 257; *et post*, tit. "Statutes of Limitations."

(e) *Grant v. Ellis*, 9 M. & W. 113.

(f) *Archbold v. Sculley*, 9 Ho. L. Cas. 360; 5 L. T. Rep. N. S. 160.

that he shall not distrain for rent that is more than twelve months overdue.(a)

Another exception is made by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 42, as amended by 53 & 54 Vict. c. 71, s. 28, which provides that although a landlord or other person to whom rent is due from a bankrupt, may, either before or after the bankruptcy, distrain the bankrupt's goods and effects, yet if he distrains after the commencement of the bankruptcy it is available only for six months' rent accrued due prior to the date of the order of adjudication. But the landlord or other person may prove under the bankruptcy for any surplus due, for which the distress may not have been available.

The words "landlord or other person" include a person entitled to rent who may not be in popular language a landlord.(b) But the Act only applies to the goods of the bankrupt, therefore the goods of a stranger upon the premises may be distrained for more than six months' rent.(c)

Where a distress is followed within three months by a receiving order against the tenant, the landlord's right to the proceeds is subject to the preferential claims for rates, taxes, &c., mentioned *post*.

Where a company is being wound up by the Court or under its supervision under the Companies Act, 1862 (25 & 26 Vict. c. 89), and amendment Acts, any distress against the company's effects is void (sect. 163); unless leave be obtained from the Court to proceed with the distress under sect. 87 of the Act.(d) And the Judicature Act, 1875, sect. 10 does not import into winding-up proceedings the section in the Bankruptcy Act, which gives a landlord priority for six months rent.(e) For further information hereon the reader is referred to Buckley on the Companies' Acts, p. 239, 6th edit.

Things Distrainable.—As a general rule all chattels personal found upon the demised premises, as well the goods of strangers as of the tenant, may be distrained for rent in arrear, unless exempted. The following are exempted :

1. *Animals feræ nature* are absolutely privileged from distress for rent, such as deer in a forest, but not deer in an inclosed ground for purposes of profit.(f)

2. *Things in actual use* are absolutely privileged, because of the danger to the public peace; as an axe with which a man is cutting wood, or a horse which he is riding.(g)

(a) *Ex parte Bull*, 18 Q. B. Div. 642; 56 L. J. 270, Q. B.; 56 L. T. Rep. N. S. 571; 35 W. R. 455.

(b) *Ex parte Hill*, 6 Ch. Div. 63; 46 L. J. 116, Bk.; 25 W. R. 784.

(c) *Brocklehurst v. Lawe*, 7 E. & B. 176; 26 L. J. 107, Q. B., approved in *Railton v. Wood*, 15 App. Cas. 363.

(d) *Re Exhall Coal Co.*, 4 De G. J. & S. 377.

(e) *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250; 50 L. J. 544, Ch.; 44 L. T. Rep. N. S. 392; 29 W. R. 596.

(f) *Woodf. L. & T.* 473, 16th edit.; *Davies v. Powell*, Willes, 46.

(g) *Storey v. Robinson*, 6 T. R. 138; *Simpson v. Hartopp*, 1 Sm. L. C. 463, 9th edit.

3. *Trade goods*.—Things delivered to a person exercising a public trade to be carried or managed in the way of his trade are, for the benefit of trade, also exempt: as cloth sent to a tailor to be made up;(a) so the goods and horses of a guest at an inn are privileged;(b) also goods pledged with a pawnbroker;(c) but it has been held that a horse and carriage standing at livery are not privileged;(d) whether it would be so held now seems doubtful,(e) where it was held that goods in the custody of a contractor for storing furniture were privileged.

4. *Things in the custody of the law* are exempt, as cattle which have been distrained *damage feasant*;(f) or goods in the custody of the sheriff under a writ of execution.(g) But by 8 Anne, c. 14, s. 1, no goods are to be taken by an execution creditor unless before removal of the goods he pay to the landlord one year's rent, if so much be then due. This right of the landlord is not interfered with by the Bankruptcy Act, 1890, s. 11, sub-s. 2.(h)

And by 7 & 8 Vict. c. 96, where the letting is at a weekly rent, the landlord's claim extends to not more than four weeks' arrears of rent; and if let for any other term less than a year the claim extends to not more than the arrears of rent accruing during four such terms of payment (sect. 67). The relationship of landlord and tenant must be actually subsisting at the time of the execution.(i) By 14 & 15 Vict. c. 25, where chattels seized and sold by the sheriff are growing crops, they are, so long as they remain on the farm and in default of other sufficient distress of the tenant, liable for rent accruing due after the seizure and sale (sect. 2). Other restrictions as to removal by the sheriff from farm lands of hay, straw, &c., were imposed by 56 Geo. 3, c. 50, ss. 1, 3, 6.

The 8 Anne, c. 14, s. 1, is by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 160, exempted from applying to executions issuing out of a County Court; but the section provides that on the landlord giving written notice to the bailiff before removal of the goods of his claim to rent, the bailiff must, out of the proceeds of the execution, satisfy the landlord's claim not exceeding four weeks rent where the letting is by the week, or the rent of two terms where the letting is for any other term less than a year, and the rent of one year in any other case.

5. *Loose money* is privileged, as one piece cannot be known from

(a) Co. Lit. 47, b.; Bullen Dist. 108, 2nd edit.

(b) *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(c) *Swire v. Leach*, 18 C. B. N. S. 479; 34 L. J. 150, C. P.; 11 L. T. Rep. N. S. 680.

(d) *Parsons v. Gingell*, 4 C. B. 545; 16 L. J. 227, Q. B.

(e) See *Miles v. Furber*, L. R. 8 Q. B. 77; 42 L. J. 41 Q. B.; 27 L. T. Rep. N. S. 756; 21 W. R. 262.

(f) Co. Lit. 47, a.; Bullen, Dist. 93, 2nd edit.

(g) *Wright v. Dewes*, 1 A. & E. 641.

(h) *Re Neil MacKenzie*, 68 L. J. 1003, Q. B.; 81 L. T. Rep. N. S. 214; (1899) 2 Q. B. 566, C. A.

(i) *Cox v. Leigh*, L. R. 9 Q. B. 333; 43 L. J. 123, Q. B.; 30 L. T. Rep. N. S. 494; 22 W. R. 730.

another; and therefore the pieces taken might not be restored; for at common law a distress was only a pledge in the landlord's hands. But money in a sealed bag may be taken.(a)

6. *Goods which cannot be restored in the same condition* as when distrained, as butcher's meat, are also privileged. And for this reason, at common law, cocks and sheaves of corn could not be taken, but by 2 Will. & M. c. 5, they were made distrainable for rent.(b)

7. *Straying Cattle*.—The cattle of a stranger which have strayed upon the tenant's lands through the latter's or his landlord's default in not repairing the fences are not distrainable for rent until they have been *levant* and *couchant* for a day and a night, and notice has been given to their owner. But if the cattle have strayed by their owner's default, or are upon the land with his consent, they are not privileged,(c) save under the Agricultural Holdings Act, as stated *post*.

8. *Fixtures* are also absolutely privileged from distress, either (1) as not being chattels but part of the freehold, or (2) because the things if taken could not be restored in the same condition. Keys of doors, doors, and windows are constructively part of the freehold.(d) And fixtures which are removable by the tenant, as stoves or grates, cannot be distrained for rent.(e)

Growing crops, being considered part of the freehold, were at common law exempt from distress; but by 11 Geo. 2, c. 19, the landlord is empowered to distrain for arrears of rent, corn, or other products growing on the demised land; and to cut, carry, and store the same *when ripe* in barns upon or near the premises; and to appraise and sell the same. Notice of the storing is to be given to the tenant within a week thereafter (sects. 8, 9).

9. *The Goods of Ambassadors* or other public ministers of any foreign prince or State, and those of their servants, are by 7 Anne, c. 12, s. 3, absolutely privileged from distress.

10. *Lodgers' Goods*.—By 34 & 35 Vict. c. 79, if a superior landlord distrains on any chattels of a lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve the superior landlord or the bailiff employed to levy the distress with a written declaration, stating that the immediate tenant has no right or interest in such chattels, and that they are the lodger's property, also stating whether any, and, if so, what rent is due from the lodger to his immediate landlord; and he may pay to the superior landlord or his bailiff, the rent, if any, so due, or so much as is sufficient to discharge the superior landlord's claim. And the declaration must have annexed a correct inventory, subscribed by the lodger, of the chattels referred to in the declaration.

(a) 3 St. Com. 273, 12th edit.; Woodf. L. & T. 465, 15th edit.

(b) *Simpson v. Hartopp*, 1 Sm. L. C. 474, 9th edit.; Bullen, Dist. 103, 2nd edit.

(c) Woodf. L. & T. 481, 15th edit.; Bullen, Dist. 121, 2nd edit.

(d) *Simpson v. Hartopp*, *sup.*; Bullen, Dist. 105, 2nd edit.

(e) *Darby v. Harris*, 1 Q. B. 895; 5 Jur. 988; but see *Hellawell v. Eastwood*, 6 Ex. 295; 20 L. J. 154, Ex.

Knowingly making a false declaration and inventory is a misdemeanour (sect. 1). If the superior landlord or his bailiff, after being served with the declaration and inventory, and after payment or tender of rent, if any, as aforesaid, shall levy or proceed with a distress on the lodger's chattels, such superior landlord or his bailiff is guilty of an illegal distress. And the lodger may apply for an order for restoration of such furniture and chattels, to be heard by a stipendiary magistrate or two justices of the peace, who must inquire into the truth of the declaration and inventory, and make such order for the recovery of the chattels or otherwise as seems just. The superior landlord is also liable to an action at the suit of the lodger, at the hearing of which the like inquiry is made (sect. 2). To come within the term lodger, a person must sleep on the premises; a mere occupation for business purposes is not sufficient.^(a) But the mere right of exclusive possession of a considerable part of a dwelling-house is not inconsistent with the occupant being a lodger.^(b)

11. *Under the County Courts Act.*—By the law of Distress Amendment Act (51 & 52 Vict. c. 21), s. 4, any goods of the tenant or his family, which would be protected from seizure in execution under the County Courts Act, are exempt from distress for rent; but this is not to extend to any case where the tenancy has expired, and possession of the premises been demanded, and the distress is made not earlier than seven days after such demand (sect. 4). By the County Court Act, 1888 (51 & 52 Vict. c. 43), the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade, to the value of 5*l*, are exempted from seizure in execution (sect. 147).

12. *Machinery and Breeding Stock.*—In the case of tenancies to which the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies, agricultural or other machinery which is the *bond fide* property of a person other than the tenant, and is on the tenant's premises under a *bond fide* agreement with him for the hire or use thereof in his business, and live stock of all kinds, which is the *bond fide* property of a person other than the tenant, and is on the tenant's premises for *breeding* purposes, are exempt from distress for rent (sect. 45).

13. *Gas, Water, &c.*—Under 10 & 11 Vict. c. 15, s. 14,^(c) and 34 & 35 Vict. c. 41, s. 18, gas meters and fittings let on hire by the undertakers are exempt from distress. So under 26 & 27 Vict. c. 93, s. 14, water meters, &c., are exempt; and by the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 25, also electric meters, &c.

Qualified Privilege.—In addition to the foregoing, the following goods are privileged *sub modo*, that is, are not to be distrained for rent, if there be other sufficient distress on the premises:—

1. Beasts of the plough and sheep, as these improve the land.^(d)

(a) *Heawood v. Bone*, 13 Q. B. Div. 179; 51 L. T. Rep. N. S. 125; 32 W. R. 752.

(b) *Phillips v. Henson*, 3 C. P. Div. 26; 47 L. J. 273, C. P.; 37 L. T. Rep. N. S. 432; 26 W. R. 214.

(c) See, however, as to this section, 38 & 39 Vict. c. 66.

(d) 51 Hen. 3, stat. 4; Woodf. L. & T. 479, 15th edit.

2. The tools and implements of a man's trade, though not in use at the time, are also privileged *sub modo*.(a)

3. Under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), where live stock belonging to another person has been taken in by a tenant of a holding to which the Act applies, to be fed at a fair price to be paid by the owner of the stock to the tenant, such stock is not distrainable for rent where there is other sufficient distress to be found; and if so distrained, it is only to be for the price agreed to be paid for the feeding, or for any unpaid balance of such price. And the owner may at any time before sale redeem such stock by paying to the distrainor the amount due for feeding, &c. (sect. 45). The price to be paid need not necessarily be of money; for instance, it may be the milk of the cows agisted.(b) But the agreement must not give the owner of the cattle "the exclusive right to feed the grass" for a given time; for by such an agreement the cattle are not "taken in to be fed at a fair price," or agisted.(c)

Bankruptcy, &c., of Tenant.—It has already been stated what amount of rent can be distrained for in case of the bankruptcy of a tenant, and on what terms a landlord may distrain in case of a company being wound up by the Court (see *ante*, p. 321). The preferential payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), provides that in the distribution of the property of a bankrupt, or of the assets of a company being wound up, certain rates and taxes, the wages or salary of a clerk, or servant, and the wages of a labourer or workman, are to be paid in priority to all other debts (sect. 1, sub-sect. 1); and, further, that in the event of a landlord distraining the goods or effects of a bankrupt or company being wound up within three months next before the date of the receiving order or winding up order respectively, the debts to which priority is given by the section are to be a first charge on the goods or effects distrained upon or the proceeds of the sale thereof. But for any money paid under any such charge the landlord is to have the same rights of priority as the person to whom the payment is made (sub-sect. 4).

When Distress to be Made.—Rent not being in arrear until the day on which it is due has elapsed (*ante*, p. 314), it follows that a distress cannot be made until the following day, after sunrise and before sunset.(d)

At common law a distress could not be made after the tenancy had expired, though the tenant continued in occupation.(e) By 8 Anne, c. 14, however, a landlord may distrain for rent in arrear upon a lease for life, for years, or at will, after the determination of the lease if the distress be made within six calendar months thereafter, and during the continuance of the landlord's title or interest, and the possession of the tenant

(a) *Simpson v. Hartopp*, 1 Sm. L. C. 463, 9th edit.; Woodf., *sup*.

(b) *London, &c., Bank v. Belton*, 15 Q. B. Div. 457; 54 L. J. 568, Q. B.; 34 W. R. 31.

(c) *Masters v. Green*, 20 Q. B. Div. 807; 59 L. T. Rep. N. S. 476; 36 W. R. 591.

(d) *Tutton v. Darke*, 5 H. & N. 647; 29 L. J. 271, Ex.; 2 L. T. Rep. N. S. 361.

(e) *Williams v. Stiven*, 9 Q. B. 14; 15 L. J. 321, Q. B.

(sects. 6, 7). The statute it seems only applies where the lease expires by effluxion of time, and not where it is put an end to by a forfeiture.(a)

It has already been stated what arrears of rent are recoverable.(b)

Where Distress may be Made.—The general rule is that a distress can only be made upon goods found upon some part of the demised premises,(c) and not “on the King’s highway or in the common street.”(d) To the general rule there are several exceptions : (1) the Crown may distrain on lands wherever situate ;(e) (2) and a landlord where the tenant’s cattle are upon any common appendant or appurtenant to the demised premises ;(f) (3) where by agreement the tenant gives his landlord power to distrain upon other lands than those out of which the rent issues ;(g) but in such case it might be a question whether the lease would require registration under the Bills of Sale Acts ;(h) (4) and if a landlord coming to distrain his tenant’s cattle sees them on the premises and they are driven off in order to prevent the distress, the landlord may follow them, and distrain even in the highway.(i) And (5) by 11 Geo. 2, c. 19, where a tenant fraudulently or clandestinely removes his goods from the demised premises to prevent a distress for rent, the landlord or his agent may within *thirty days* next after such removal, distrain the goods wherever they may be found (sect. 1), provided they have not before seizure been sold *bonâ fide* and for value to any person not privy to the fraud (sect. 2) ; and further, if the goods have been removed to, and locked up in, any house, barn, &c., the landlord or his agent may, first calling in the aid of a constable, and in the case of a dwelling-house, also making oath before a justice of the peace of reasonable ground to suspect that the goods are therein, in the daytime, break open and enter into such house, barn, &c., and seize the goods for the arrears of rent (sect. 7).

The statute only applies when the rent has actually become due before the removal.(k) And it only applies to the goods of the tenant, and not to those of a stranger.(l)

By Whom and How Levied.—A distress for rent must be levied by the landlord,(m) or under the Law of Distress Amendment Act, 1888, by a bailiff (not being an officer of a county court) duly authorised by a written

(a) *Grimwood v. Moss*, L. R. 7 C. P. 360 ; 41 L. J. 239, C. P. ; 27 L. T. Rep. N. S. 268 ; 20 W. R. 972.

(b) *Ante*, p. 320 ; and see post tit. “ Statutes of Limitations.”

(c) Woodf. L. & T. 487, 15th edit.

(d) 52 Hen. 3, c. 15.

(e) See 52 Hen. 3, c. 15 ; Woodf. L. & T. 487, 15th edit.

(f) 11 Geo. 2, c. 19, s. 8.

(g) *Daniel v. Stepney*, L. R. 9 Ex. 185 ; 22 W. R. 662.

(h) *Lee v. Roundwood Colliery Co.*, 66 L. J. 186, Ch. ; 75 L. T. Rep. N. S. 641 ; 45 W. R. 324 ; (1897) 1 Ch. 373, C. A. ; *et ante*, p. 207.

(i) Co. Lit. 161, a ; Redm. & Ly. L. & T. 172, 2nd edit. ; Bullen, dist. 144, 2nd edit.

(k) *Rand v. Vaughan*, 1 Bing. N. C. 767 ; *Dibble v. Bowater*, 2 El. & Bl. 564.

(l) *Thornton v. Adams*, 5 M. & S. 38 ; *Postman v. Harrel*, 6 C. & P. 225.

(m) *Hogarth v. Jennings*, (1892) 1 Q. B. 907 ; 61 L. J. 601, Q. B. ; 66 L. T. Rep. N. S. 821 ; 40 W. R. 517.

certificate, which, if general, must be under the hand of a county court judge, or, if special, applying to a particular distress, under the hand of such judge or his registrar.(a)

When the bailiff has obtained such a certificate it is not necessary that he should have a written authority from the landlord, but it is better that he should have one; though a bailiff's unauthorised distress may be ratified by the landlord.(b)

Entry may be made into the demised premises by opening an outer door in the ordinary way, as by lifting the latch; but if the door of a dwelling-house is secured it cannot, save as stated *infra*, be broken open,(c) nor can the door of a barn or other building be broken open, whether within the curtilage of the dwelling-house,(d) or not.(e) Entry may, however, be made through an *open* window,(f) although it may be necessary to open it further;(g) but entry cannot be lawfully made by opening a closed, though unfastened, window.(h) So the bailiff may climb over a fence or wall into the yard of the house and enter and distrain.(i) When an entry has been lawfully made, an inner door or lock may be broken open.(k)

There are, however, exceptions to the rule that an outer door cannot be broken open: (1) Where *complete* and lawful entry has once been made, and the distrainer is forcibly expelled, he may break open an outer door to renew the distress;(l) also where he leaves the premises for a temporary purpose, and on his return is locked out;(m) and (2) where the goods have been fraudulently removed to avoid a distress, as stated *ante*, p. 326.

Seizure of part of the goods in the name of all amounts to a seizure of all.(n) The seizure may, however, be constructive.(o) After seizure, notice of the distress and the cause thereof should be left at the chief mansion house or other notorious place on the premises charged with the rent distrained for before sale of the goods.(p) An inventory of the goods taken should also be made, and served on the tenant.(q)

Impounding the distress may, by 11 Geo. 2, c. 19, take place on the

(a) See 51 & 52 Vict. c. 21, s. 7, and Rules 3, 6.

(b) Bullen, Dist. 150, 2nd edit.; *Trevillian v. Pine*, 11 Mod. 112.

(c) *Semayne's Case*, 1 Sm. L. C. 115, 9th edit.; *American Co. v. Hendry*, 68 L. T. Rep. 742.

(d) *Long v. Clarke*, (1894) 1 Q. B. 119; 63 L. J. 108, Q. B.; 69 L. T. Rep. N. S. 654; 42 W. R. 130.

(e) *Brown v. Glenn*, 16 Q. B. 254; 20 L. J. 205, Q. B.

(f) *Long v. Clarke*, *ubi sup.*

(g) *Crabtree v. Robinson*, 15 Q. B. Div. 312; 54 L. J. 544, Q. B.; 33 W. R. 936.

(h) *Nash v. Lucas*, L. R. 2 Q. B. 590; 16 L. T. Rep. N. S. 610.

(i) *Long v. Clarke*, *ubi sup.*

(k) Bullen, Dist. 155, 2nd edit.

(l) *Eldridge v. Stacey*, 15 C. B. N. S. 458; 12 W. R. 51; 9 L. T. Rep. N. S. 291; *Boyd v. Profaze*, 16 L. T. Rep. N. S. 431.

(m) *Bannister v. Hide*, 2 E. & E. 627; 29 L. J. 141, Q. B.; 1 L. T. Rep. N. S. 438.

(n) Bullen, Dist. 153, 2nd edit.; *Doe v. Monger*, 6 Mod. 215.

(o) *Swann v. Falmouth*, 8 B. & C. 456; *Cranmer v. Mott*, L. R. 5 Q. B. 357.

(p) See 2 Will. & M. c. 5, s. 2.

(q) Woodf. L. & T. 517, 15th edit.

premises (sect. 10). In fact, in the case of sheaves or cocks of corn, or corn loose, or hay lying, they must not be removed.^(a) The person impounding animals must, by 12 & 13 Vict. c. 92, supply them with a sufficient quantity of food and water (sect. 5). Where goods are impounded under sect 10 of 11 Geo. 2, c. 19, it is not necessary that the landlord should retain actual possession of them.^(b)

Appraisalment and Sale.—The stat. 2 Will. & M. c. 5, s. 2, allows the tenant five days next after the distress and notice thereof given (*ante*), to replevy the goods; but after the five days the distrainor might, after causing the goods to be appraised by two appraisers, sell them to satisfy the rent, &c. The above five days may, however, by 51 & 52 Vict. c. 21, be extended to not more than fifteen days on the written request of the tenant or owner of the goods to the distrainor, and on giving security for any additional cost occasioned thereby (sect. 6). And appraisalment of the goods before sale is no longer necessary, unless the tenant or owner of the goods by writing require it to be made. So he may by writing request the goods to be removed to a public auction room, &c., to be there sold; the costs, &c., in each case being paid by such person (sect. 5).

Apportionment of Rent.—It yet remains to treat briefly of apportionment of rent, which may be necessary (1) in respect of time, and (2) in respect of estate.

1. Apportionment in respect of time arises only by statute; thus, where a tenant for life had demised lands, not under a power, and died during the interval between two of the rent days, the rent from the last rent day up to the time of such death was lost; because at common law such a lease ended at the death of the tenant for life,^(c) and rent was not apportionable in respect of time. However, by 11 Geo. 2, c. 19, s. 15, the executors or administrators of such tenant for life might recover from the lessee a proportion of the rent calculated from the last rent day to the death; and by 4 & 5 Will. 4, c. 22, ss. 1, 2, further powers of apportionment of rents were given. These Acts, however, only applied where the interest of the person interested in the rent terminated by his death or by the death of another person, and not as between the real and personal representatives of a person dying seized in fee.^(d)

However, by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), it is enacted that rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are to be considered as accruing from day to day, and to be apportionable in respect of time (sect. 2). This enactment applies to all instruments whether coming into operation before or after the Act.^(e)

(a) 2 Will. & M. c. 5, s. 3; see also 11 Geo. 2, c. 19, s. 8.

(b) *Jones v. Biernstein*, 68 L. J. 267, Ch.; 80 L. T. Rep. N. S. 157; (1899) 1 Q. B. 470; 47 W. R. 239; (1900) 1 Q. B. 100, C. A.

(c) See 2 Platt, Leases, 139; *et ante*, p. 283.

(d) *Brown v. Amyott*, 3 Hare, 173; 13 L. J. 232, Ch.

(e) *Re Cline's Estate*, L. R. 18 Eq. 213; 22 W. R. 512; *Lawrence v. Lawrence*, 26 Ch. Div. 795; 53 L. J. 982, Ch.; 50 L. T. Rep. N. S. 715; 32 W. R. 791.

But it does not extend to any case where it is expressly stipulated that no apportionment shall take place (sect. 7).

The apportioned part of the rent, &c., is to be payable or recoverable when the entire portion becomes due and payable, or would have done so but for the death, and not before (sect. 3); so that the Act does not alter the date at which the rent becomes due.^(a) And all persons and their representatives and assigns are to have the same remedies for recovering apportioned parts as for entire portions; provided that persons liable to pay rents reserved out of, &c., lands, or hereditaments, and the same lands, &c., are not to be resorted to for such apportioned part of an entire or continuing rent specifically, but the entire or continuing rent, including the apportioned part, is to be recovered and received by the heir or other person who, if the rent had not been apportionable, would have been entitled to such entire or continuing rent, and the apportioned part is to be recoverable from such heir, &c., by the executors or other parties entitled under the Act to the same by action (sect. 4).

Notwithstanding the words of the proviso to sect. 4, if there have been assignments of the lease sect. 2 enables the landlord to recover the apportioned rent from each tenant for the period during which he held the premises.^(b)

2. Apportionment in respect of *estate* arises where the lessor grants away part of his reversion, for the entire rent must now be apportioned between the reversioner and his grantee; but (subject to the Conveyancing Act, 1881), they cannot, without the consent of the tenant, apportion such rent, unless it is apportioned by a jury;^(c) or by a judge placed by agreement of the parties in the position of a jury.^(d) In the case of leases made after the above Act, it is provided that rent reserved by a lease is to go with the reversion or any part thereof notwithstanding severance, and is to be capable of being recovered, &c., by the person entitled to the income of the whole or any part of the land leased,^(e) as will be more fully shown subsequently.

Again, where a tenant is evicted from part of his holding by a title paramount there will be an apportionment of rent as to the part remaining; so where the tenant surrenders part of the lands to his landlord.^(f) And it may arise where part of the land leased is required for public purposes under the Land Clauses Act, 1845,^(g) or under the Agricultural Holdings Act, 1883.^(h)

(a) *Re United Club Co.*, 60 L. T. Rep. N. S. 665.

(b) *Swansea Bank v. Thomas*, 4 Ex. Div. 94; 40 L. T. Rep. N. S. 558; 27 W. R. 491; *Hopkinson v. Lovering*, 11 Q. B. Div. 92; 52 L. J. 391, Q. B.

(c) *Bliss v. Collins*, 5 B. & Ald. 866.

(d) *Mayor of Swansea v. Thomas*, 10 Q. B. Div. 48; 52 L. J. 340, Q. B.; 47 L. T. Rep. N. S. 657; 31 W. R. 506.

(e) 44 & 45 Vict. c. 41, s. 10; see also ss. 11, 12, *post*.

(f) Woodf. L. & T. 427, 15th edit.

(g) 8 & 9 Vict. c. 18, s. 119.

(h) 46 & 47 Vict. c. 61, s. 41.

Covenant to Pay Rates and Taxes.

After the covenant to pay rent, the covenant to pay rates and taxes follows. In the absence of express stipulation in the lease or agreement of demise, certain taxes and outgoings must be borne by the landlord, and others by the tenant. The landlords' property tax is one of the burdens falling upon the landlord, and an express contract by the tenant will not exonerate the landlord from this liability. The payment is, however, in the first instance made by the tenant, who must deduct the amount out of the next payment of rent, and the landlord is bound to allow the deduction under the penalties imposed by the Act.^(a)

Land tax is also, in the absence of stipulation, a burden falling upon the landlord, and, when paid by the tenant, may be deducted from his rent.^(b)

Tithe rent charge is under 6 & 7 Will. 4, c. 71, charged upon the land recoverable by distress, and when paid by the tenant may be deducted from his next payment of rent.^(c) By the Tithe Act, 1891 (54 Vict. c. 8), this charge is henceforth to be payable by the owner of the lands out of which it issues, notwithstanding any contract between him and the occupier, and any contract made after the passing of the Act for payment thereof by the occupier is void (sect. 1, sub-sect. 1). But under such a contract made before the Act, the occupier is liable to pay to the owner the amount he has properly paid on account of tithe rent charge, which the occupier is liable to pay under his contract (sub-sect. 2); and such sum is recoverable from the occupier by distress (sub-sect. 3). But, subject to this, tithe rent charge is only recoverable when three months in arrear by an order of the proper county court, which, if the lands are occupied by the owner, is enforced by an officer of the County Court by distress, and failing distress by possession under sect. 82 of the Tithe Act, 1836; and in any other case by the appointment of a receiver (sect. 2). But no personal liability, upon either occupier or owner, is imposed by the Act (sub-sect. 9).

Sewers rate, being in the nature of a permanent improvement, in the absence of stipulation to the contrary, falls upon the landlord; though it is usually paid by the tenant in the first instance.^(d) But as to sewers vested in the local authority under the Public Health Act, 1875, see 38 & 39 Vict. c. 55.

Poor rate is, as a rule, payable by the tenant, but by 32 & 33 Vict. c. 41, the occupier of any hereditament let to him for a term not exceeding three months may deduct from his rent the amount paid by him for poor rate (sect. 1; see also sects. 3, 4, 8).

Other rates, such as house duty, watching, lighting, highway and general district rates, and similar impositions are charged upon the occupier and payable by him in the absence of stipulation to the

(a) 5 & 6 Vict. c. 35, s. 60, Sch. A., No. 4, r. 9, ss. 73, 103.

(b) 38 Geo. 3, c. 5, ss. 17, 18, 35.

(c) See ss. 67, 80, 81; *Griffinhoof v. Daubuz*, 4 E. & B. 230, aff. 5 *Id.*, 746; 24 L. J. 20, Q. B.

(d) *Palmer v. Earith*, 14 M. & W. 428.

contrary.(a) And it is a common practice, by stipulation in the lease, to throw the liability to pay the landlord's taxes, except the landlord's property tax, and tithe rent charge, upon the tenant. And if a lessee covenants "to pay all taxes," it will include all parliamentary taxes, and therefore land tax.(b) But a covenant to pay "all taxes, parochial or parliamentary," will not comprise sewers rate, for it is neither parochial nor parliamentary.(c)

In regard to payments imposed by statute for *permanent improvements* on the land, great difficulty often arises as to who is to bear the burden. Not only are the words of the particular covenant to be looked at, but also those of the section of the statute under which the work is done. Thus where the lessee of a house in a new street covenanted to pay "all rates and assessments taxed, rated, charged or assessed, or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof," it was sought to make him liable thereunder for the due proportion of the expense of paving the new street in which the demised house was situate, under the Metropolitan Management Acts (18 & 19 Vict. c. 120, s. 105; 25 & 26 Vict. c. 102, s. 96). But it was held that he was not liable, first because the charges mentioned in the covenant were annual charges, but this was a payment to be made once for all; and secondly the Acts did not charge the expense on the premises, but imposed it on the owner.(d)

Where, however, a tenant covenanted to pay "all taxes, rates, *duties and assessments* which, during the continuance of the demise, should be taxed, assessed or imposed on the tenant or *landlord* of the premises demised in respect thereof," the tenant was held liable to pay or refund to the landlord the apportioned cost of paving the street in which the premises were situate, executed under the Metropolitan Management Acts (*supra*), as being a "duty" or "assessment" within the terms of his covenant.(e) It will be noticed that the covenant in this case contained the additional word "duties" assessed or imposed on the "tenant or landlord," which did not occur in the case of *Allum v. Dickinson* (sup.). And a tenant was held similarly liable to pay the landlord's proportion of the expenses of paving a street under the above statutes where his covenant after an enumeration, contained the words "and all out-goings payable by landlord or tenant in respect of the premises."(f)

(a) Redm. & Ly. L. & T. 253, 4th edit.

(b) *Brewster v. Kitchell*, 1 Salk. 198; *Amfield v. White*, Ry. & Mo. 246.

(c) *Palmer v. Earith*, 14 M. & W. 428.

(d) *Allum v. Dickinson*, 9 Q. B. Div. 632; 52 L. J. 190, Q. B.; 47 L. T. Rep. N. S. 493; 30 W. R. 930, C. A.

(e) *Thompson v. Lapworth*, L. R. 3 C. P. 149; 37 L. J. 74, C. P.; 17 L. T. Rep. N. S. 507; 16 W. R. 312; see also *Budd v. Marshall*, 5 C. P. Dur. 481; 50 L. J. 24, C. P.; 42 L. T. Rep. N. S. 793; 29 W. R. 148; *Brett v. Rogers*, 76 L. T. Rep. N. S. 26; 66 L. J. 287, Q. B.; (1897) 1 Q. B. 525; *Wix v. Rutson*, 68 L. J. 298, Ch.; 80 L. T. Rep. N. S. 168; (1899) 1 Q. B. 474.

(f) *Aldridge v. Ferne*, 17 Q. B. Div. 212; 55 L. J. 587, Q. B.; 34 W. R. 578; see also *Hartley v. Hudson*, 4 C. P. Div. 367; 48 L. J. 751, C. P.

But it has recently been held that an agreement by a tenant from year to year to pay "all out-goings" does not include a new rate imposed by a local statute during the tenancy, on the occupiers, who in the absence of agreement to the contrary, might by the statute deduct the payment from the rent.(a) A covenant by a tenant to pay "rates, taxes and assessments," extends only, as a rule, to assessments of a temporary and recurring nature, and does not include a charge imposed upon the owner for the permanent improvement of his property.(b) And a covenant by the tenant "to pay all rates, taxes, assessments, and impositions, which should become payable in respect of the demised premises," will not throw upon him payments made by the landlord in respect of the demised premises for the breach of a duty imposed upon *him* by statute, and not upon the premises; as where after notice to a landlord by a local authority under their improvement Act to pave and sewer his proportion of the street in which the demised premises were situate, he made default, and the local authority did the work and recovered the cost thereof from him. For the payment is not a rate, assessment, or imposition made in respect of the demised premises, but for the breach of a duty imposed upon the owner.(c)

Sometimes the *reddendum* of a lease, or a covenant therein, provides that the rent shall be paid "without any deduction or abatement,"(d) or for the payment of a "net" rent;(e) in either of which cases the burden of paying all rates and taxes, except the landlord's property tax, and now, tithe rent charge,(f) is thrown upon the tenant. But neither of these forms of expression throw upon the tenant charges for permanent improvement of the property.(g)

In some instances the lessor agrees to pay rates and taxes, and a covenant by him to pay "all taxes on the demised land" will not include poor rate, for it is a personal charge.(h) So where he covenanted to pay "all rates and impositions imposed by the Corporation of the City of London, or otherwise, assessed on the premises or on the landlord or tenant," it was held that the lessor was not liable to pay the water rate as that obligation was voluntarily incurred by the tenant, and therefore was not "imposed" upon the tenant, &c.(i)

(a) *Vestry of Mile End Old Town v. Whitley*, 78 L. T. Rep. N. S. 80.

(b) *Wilkinson v. Collyer*, 13 Q. B. Div. 1; 53 L. J. 278, Q. B.; 51 L. T. Rep. N. S. 299; 32 W. R. 614.

(c) *Tidswell v. Whitworth*, L. R. 2 C. P. 326; 36 L. J. 103, C. P.; 15 L. T. Rep. N. S. 574; 15 W. R. 427; *Bayliss v. Jiggins*, (1898) 12 Q. B. 315; 67 L. J. 793, Q. B.; 79 L. T. Rep. N. S. 78.

(d) *Bradbury v. Wright*, 2 Dug. 624.

(e) *Bennett v. Womack*, 7 B. & C. 627.

(f) See *ante*, p. 330.

(g) *Home and Colonial Stores v. Todd*, 63 L. T. Rep. N. S. 829.

(h) *Rowls v. Gells*, Cowp. 452.

(i) *Badcock v. Hunt*, 22 Q. B. Div. 145; 58 L. J. 134, Q. B.; 60 L. T. Rep. N. S. 314; 37 W. R. 205, C. A.; but see *Spanish Telephone Co. v. Shepherd*, 13 Q. B. Div. 202; 53 L. J. 420, Q. B.

Covenants to Repair and Insure.

Implied Covenant to Repair.—Every lease should contain an express agreement or covenant to repair the demised premises; but in the absence of such a stipulation, under a contract of tenancy, whether by deed or other writing, or by parol, an undertaking is implied by law that the tenant will use the premises in a tenant-like manner.^(a) Indeed, by 52 Hen. 3, c. 23, and 6 Ed. 1, c. 5, a tenant for life or years was expressly made liable for waste. Waste may be either voluntary or permissive. Voluntary or actual waste consists of such acts as pulling down buildings, or cutting down timber, or opening mines, or converting arable land into pasture. Permissive waste consists of omissions, as permitting the buildings to fall into decay for want of necessary repair.^(b) A tenant for years is liable not only for actual but also for permissive waste;^(c) but a tenant for life of freeholds seems only to be liable for permissive waste when he is under some obligation to keep the premises in repair.^(d) But it is otherwise as to a copyhold granted for more lives than one.^(e) The liability of a legatee of leaseholds bequeathed to him for life, and then over, will be treated of in a subsequent chapter.^(f) It is said that a tenant at will is not liable for permissive waste;^(g) so it has been held that a tenant from year to year is not liable for permissive waste, or to make good mere wear of the premises,^(h) yet it has been decided that under his implied obligation to repair, a tenant from year to year is bound to keep the premises wind and water tight;⁽ⁱ⁾ thus, if a window or a tile were accidentally broken, he would be liable if he did not repair it, provided the plain consequence of his neglect would be a serious damage to the house from the wet or the like.^(k) However, he is not bound to do substantial repairs, as new roofing.^(l) And by force of 14 Geo. 2, c. 78, s. 86, neither a tenant for years, nor a tenant from year to year is liable under his implied covenant to repair for damage to the premises caused by *accidental* fire. This

(a) Woodf. L. & T. 632, 15th edit.

(b) Co. Lit. 58, a, b; Woodf. L. & T. 646, 16th edit.; Redm. & Ly. L. & T. 222, 225, 4th edit.

(c) *Yellowly v. Gower*, 11 Ex. 274; *Davies v. Davies*, 38 Ch. Div. 499; 57 L. J. 1093, Ch.; 58 L. T. Rep. N. S. 514; 36 W. R. 399.

(d) *Woodhouse v. Walker*, 5 Q. B. Div. 404; 49 L. J. 609, Q. B.; 42 L. T. Rep. N. S. 770; *Re Cartwright*, 41 Ch. Div. 532; 58 L. J. 590, Ch.; 60 L. T. Rep. N. S. 891; 37 W. R. 612; *Re Freeman*, (1898) 1 Ch. 28; 67 L. J. 14, Ch.; 77 L. T. Rep. N. S. 460.

(e) *Blackmore v. White*, (1899) 1 Q. B. 293; 68 L. J. 180, Q. B.; 80 L. T. Rep. N. S. 79; 47 W. R. 448.

(f) See post, tit. "Wills."

(g) Woodf. L. & T. 632, 15th edit.

(h) *Torriano v. Young*, 6 C. & P. 8.

(i) *Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 C. & P. 327.

(k) Chit. Cont. 316, 11th edit.; 412, 12th edit.; *Fergusson v. ———*, 2 Esp. 590.

(l) *Leach v. Thomas*, sup.; *Fergusson v. ———*, sup.

enactment, though applying to the Metropolis, has been held to be general in its application.(a)

On the other hand, there is in ordinary cases no covenant or promise implied by law on the part of the lessor that he will do any repairs whatever to the premises,(b) even if they became uninhabitable for want of repair, nor is the tenant relieved from his tenancy.(c) But an agreement for a lease of an unfinished house, which the landlord is to finish and deliver to the tenant, who is to be under covenants to repair, implies an undertaking to deliver it in complete tenantable repair.(d)

Express Covenants to Repair.—From the foregoing decisions it will be noticed how desirable it is to have an express covenant or agreement to repair inserted in the instrument of demise. In fact, in some cases it is necessary to insert such a clause without any exception; thus, in a lease by a tenant for life under the Settled Estates Act, 1877, s. 46,(e) the covenant to repair exempted the lessee from liability “for fair wear and tear, and damage by tempest,” and the lease was held void as being in contravention of the Act.(f)

As to what repairs must be done under an express contract to repair, this must to some extent depend upon the wording of the contract. Under a general covenant to repair, the amount and quality of repairs necessary is always relative to the age, class, and locality of the premises.(g)

The case of *Proudfoot v. Hart*(g) may now be considered as a leading case on the question of repairs between landlord and tenant when there is a contract to repair. In that case it was held that, under an agreement to keep a house in “good tenantable repair,” and so leave the same at the expiration of the term, the tenant’s obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. The age of the house must be taken into consideration, for the same nicety of repair is not exacted for an old building as for a new one. So the locality of the house must be considered, for the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it. The tenant need not, it seems, re-paper the walls because the paper thereon has become worn, nor

(a) *Filliter v. Phippard*, 11 Q. B. 347; 17 L. J. 89, Q. B.; but see *ante*, p. 54, *et post*.

(b) *Woodf. L. & T.* 633, 15 edit.; *Gott v. Gandy*, 2 E. & B. 845; 23 L. J. 1, Q. B.

(c) *Arden v. Pullen*, 10 M. & W. 321.

(d) *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J. 362, Ch.; 6 L. T. Rep. N. S. 98, 10 W. R. 328.

(e) *Ante*, p. 284.

(f) *Davies v. Davies*, 38 Ch. Div. 499, *et ante*, p. 284.

(g) *Payne v. Haine*, 16 M. & W. 541; *Proudfoot v. Hart*, 25 Q. B. Div. 42; 59 L. J. 389, Q. B.; 63 L. T. Rep. N. S. 171; 38 W. R. 730, C. A.

whitewash ceilings merely because they are blacker than when he took the house. But he must repaint woodwork to keep it from decay; and if a floor has become rotten, then, if he can make it good by patching, that is sufficient, but if not, he must, under the above covenant, put in a new floor.(a)

Under a covenant by the tenant to keep premises in repair without any exception,(b) he would be bound to rebuild them at his own cost if they should be destroyed by fire.(c) But it seems his liability is limited to what it would cost to put them into the same condition as that in which they were when he took them.(d) And if the landlord has insured the premises and received the insurance money, he cannot be compelled to expend it in rebuilding the premises, nor can he be restrained from suing for rent until the premises are rebuilt.(e) But under 14 Geo. 3, c. 78, s. 83, *any person interested* in premises insured may apply to the directors to have the insurance money laid out in rebuilding them. And as before seen, this section, though applying to the Metropolis, has been held to be of general application, though the decision has since been doubted.(f) But whether a tenant is a "person interested in the premises" is not clear.(g) However, as a contract of fire insurance is a contract of indemnity, if the tenant, under his contract, restores premises which have been damaged by fire, the landlord is not entitled to receive anything under his policy against the insurance office.(h) Again, under a covenant to repair, without exception by the tenant, he would be bound to rebuild the premises if they were to fall, and also be liable to the payment of rent while they are being rebuilt.(i) And an exception relieving the tenant from liability to repair in case of fire does not bind the lessor to repair in case of a fire,(k) or release the tenant from payment of rent while the premises are uninhabitable.(l) And a clause entitling the tenant to a suspension of rent if the premises are burnt or damaged by fire or tempest, will not entitle him to such a suspension in case the premises fall from being overloaded.(m)

However, under a general covenant to repair a house, which is of such

(a) *Proudfoot v. Hart*, sup.; see also *Crawford v. Newton*, 36 W. R. 54.

(b) See hereon, *ante*, p. 314.

(c) *Bullock v. Dommitt*, 6 T. R. 650.

(d) *Yates v. Dunster*, 11 Ex. 15; 24 L. J. 227, Ex.

(e) *Leeds v. Chestham*, 1 Sim. 146; *Lofft v. Dennis*, 1 El. & Bl. 474; 28 L. J. 168, Q. B.

(f) *Ante*, pp. 54, 333, 334.

(g) Woodf. L. & T. 438, 16th edit.; Foà L. & T. 188, 2nd edit.

(h) *Darrell v. Tibbits*, 5 Q. B. Div. 560; 42 L. T. Rep. N. S. 799; 29 W. R. 66; *et ante*, p. 54.

(i) *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. Div. 507; 49 L. J. 809, C. P.; 43 L. J. 476; 29 W. R. 354; *Saner v. Bilton*, 7 Ch. Div. 815; 47 L. J. 267, Ch.; 38 L. T. Rep. N. S. 281; 26 W. R. 394.

(k) *Weigall v. Waters*, 6 T. R. 488.

(l) *Monk v. Cooper*, 2 Str. 763; *Baker v. Holtsapffell*, 4 Taunt. 45; *Holtsapffell v. Baker*, 18 Ves. 115.

(m) *Manchester Bonded Warehouse Co. v. Carr*, sup.; *Saner v. Bilton*, sup.

a kind that, by its own inherent nature, it will in course of time, fall into a particular condition of disrepair, the effects of that result are not within the covenant. Thus, where an old house was built upon a timber structure, resting on a boggy or muddy soil, and, in consequence of the timber rotting, one of the walls in course of time bulged out, and the house had to be pulled down, it was held that the tenant was not, under his covenant to repair, liable to make good the loss.(a)

To prevent all difficulty in regard to loss by fire, the lease should contain a covenant to insure the premises, and in what amount, and that the insurance money be applied in rebuilding. And if the lessee is to give the covenant he should be bound to produce the policy, and receipts for premiums when required. A covenant to insure in the names of lessor and lessee is sufficiently performed if the insurance is in the name of the lessor only ;(b) but a covenant to insure in the lessor's name is broken by the lessee adding his own name.(c) Now, however, the Court has power to relieve against a forfeiture for breach of a covenant to insure, by force of 44 & 45 Vict. c. 41, s. 14, stated *post*. A covenant to insure runs with the land,(d) as, under 14 Geo. 3, c. 78, s. 83, the insurance money may be laid out in rebuilding the premises.(e) It has already(f) been stated that a covenant to insure is not considered a "usual" covenant.

Notice to Repair.—Where the covenant is to repair after notice, the tenant does not become liable until the notice has been given.(g) But if there be a general covenant to repair, and further to repair within three months after notice, the two are separate covenants, and the lessor's right attaches for a breach of the former covenant, though no notice has been given under the latter.(h)

Where, however, the covenant to repair is by the lessor, notice to him of the want of repair is necessary (though not stipulated for) before he can be sued on his covenant.(i) Such a covenant carries with it a licence to the landlord to enter upon the premises and there remain for a reasonable time to do the repairs.(k) But it seems such a covenant may be so qualified and controlled by a subsequent declaration in the lease as to prevent this implied right of entry, and also prevent the covenant running with the reversion.(l)

(a) *Lister v. Lane*, (1893) 2 Q. B. 212 ; 62 L. J. 583, Q. B. ; 69 L. T. Rep. N. S. 176 ; 41 W. R. 626.

(b) *Havens v. Middleton*, 10 Hare, 641.

(c) *Penniall v. Harborne*, 11 Q. B. 368 ; 17 L. J. 94, Q. B.

(d) *Vernon v. Smith*, 5 B. & Ald. 1.

(e) *Ante*, pp. 54, 335.

(f) *Ante*, p. 315.

(g) *Horsfall v. Testar*, 7 Taunt. 385.

(h) *Baylis v. Le Gros*, 4 C. B. N. S. 537 ; *Few v. Perkins*, L. R. 2 Ex. 92 ; 36 L. J. 54, Ex. ; and see further, *post*, "Proviso for re-entry and forfeiture."

(i) *Makin v. Watkinson*, L. R. 6 Ex. 25 ; 40 L. J. 33, Ex. ; 23 L. T. Rep. N. S. 592 ; 19 W. R. 286 ; *Manchester Bonded Warehouse Co. v. Carr*, *supra*, p. 335 ; *Hugall v. McLean*, 53 L. T. Rep. N. S. 94 ; 33 W. R. 588.

(k) *Saner v. Bilton*, 7 Ch. Div. 815 ; 47 L. J. 267, Ch.

(l) *Eccles v. Mills*, 67 L. J. 25, P. C. ; (1898) A. C. 360.

Remedy for Non-Repair, &c. — A landlord's remedies for non-repair by the tenant are either (1) by action on the covenant or agreement for damages, or (2) by re-entry for forfeiture thereon, if the lease contains an express proviso for re-entry upon such a breach.

The Court will not order specific performance of a general covenant to repair, as already stated.(a)

Where the lease contains a proviso for re-entry for breach of the stipulation to repair, the landlord may, after giving the notice required by 44 & 45 Vict. c. 41, s. 14, and the tenant's failure to comply therewith, re-enter for breach of the covenant or agreement to repair (sub-sect. 1); but the Court may, on the tenant's application, grant relief against the forfeiture, as will be shown more fully subsequently (sub-sect. 2).

Under a covenant to repair and keep in repair during the continuance of the term an action lies for breaches committed before the time has expired.(b)

Where the action is brought during the continuance of the tenancy for breach of the covenant to repair, the measure of damage is the extent to which the lessor's reversion is injured by the non-repair;(c) and where the action is brought after the tenancy is ended for breach of the covenant to *leave* the premises in repair, the measure of damages is the cost of putting them into the state of repair required by the terms of the covenant.(d)

Agricultural Leases.

Where the demised premises consist of farms or other agricultural property, an obligation will, in the absence of express stipulation, be implied on the tenant's part to cultivate the lands in a husband-like manner according to the custom of the county;(e) which must be certain and reasonable.(f) However, a farming lease, in addition to the clauses and provisions inserted in ordinary leases, usually contains provisions (1) as to the preservation of or right to kill game, subject to the Ground Game Act,(g) also as to any other exceptions, or any reservations agreed upon;(h) (2) and, after the reservation of the rent, there is a clause that the tenant shall not, without licence, break up pasture land under payment of an additional rent of so much per acre;(i) and (3), although the tenant covenants to repair, the landlord also usually covenants to do certain repairs, and to find the tenant certain materials for his repairs; (4) the tenant to

(a) *Ante*, p. 307.

(b) *Luxmore v. Robson*, 1 B. & A. 584.

(c) *Mills v. East London Union*, L. R. 8 C. P. 79; 42 L. J. 46, C. P.; 27 L. T. Rep. N. S. 557; 21 W. R. 142.

(d) *Joyner v. Weeks*, (1891) 2 Q. B. 31; 60 L. J. 510, Q. B.; 65 L. T. Rep. N. S. 16; 39 W. R. 583; *Henderson v. Thorne*, (1893) 2 Q. B. 164; 62 L. J. 586, Q. B.; 69 L. T. Rep. N. S. 430; 41 W. R. 509.

(e) *Powley v. Walker*, 5 T. R. 373.

(f) *Bradburn v. Foley*, 3 C. P. Div. 129; 47 L. J. 331, C. P.; 38 L. T. Rep. N. S. 421; 26 W. R. 423.

(g) See *ante*, p. 310.

(h) See *ante*, p. 309.

(i) See *ante*, p. 317.

reside on the premises, and not to assign or underlet without the landlord's consent; (5) to cultivate the lands in a husband-like manner; (6) to consume and spend every year upon the premises all hay, straw, root crops, and dung there produced or made; (7) not to injure trees or saplings; and (8), in the last year of his tenancy (if the taking is at Ladyday), to sow arable land with corn, and also sow grass seeds, &c.; or (if the taking is at Michaelmas) to stack all the corn, grain, and hay produced on the premises, the corn and grain to be thrashed out, &c.; so that (in either taking) the unconsumed straw, hay, and roots may be left for the landlord or incoming tenant, who must allow or pay for the same; as also for the seed sown. Other provisions as to fences, ditches, &c., or doing acts according to the custom of the country, may be requisite.(a)

Any contract by a tenant depriving him of his right to compensation under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), for any improvement mentioned in the First Schedule to the Act (save as provided by the Act) is void (sect. 55).

Covenants as to cultivation run with the land.(b) Converting pasture into arable land is waste, as already stated,(c) but converting part of a farm into a market garden is not a breach of a covenant "to cultivate the farm according to the best rules of husbandry in the neighbourhood," if that is the custom of the neighbourhood.(d)

The Court will not decree specific performance of husbandry covenants.(e)

Building Leases.

An agreement for a building lease, *ex. gr.* of a dwelling-house, after the date and parties, usually contains the following stipulations:—(1) That when the dwelling-house is completed the landlord will grant to the intended lessee a lease of the land and the dwelling-house, &c., to be erected thereon, usually for ninety-nine years, at a peppercorn rent for the first year of the term, and at the agreed rent for the rest of the term. (2) That the lease shall contain covenants by the lessee for payment of rent, rates, taxes, &c.; to repair and deliver up the premises in good repair at the end of the term, and to insure the premises against fire, and in what amount, in the joint names of the lessor and lessee, and in what office, and to produce the policy and receipts for premiums when required; not to carry on any trade or calling in the dwelling-house; and (3) a condition of re-entry for non-payment of rent or on breach of any of the lessee's covenants. (4) The agreement also stipulates that the intended lessee will build the dwelling-house at his own cost before a given day, at a given outlay, and to the satisfaction of the landlord's surveyor; also (5) a power for the landlord or his surveyor to enter to view the progress of

(a) See forms 2 Prid. Conv. 101, *et seq.*, 16th edit.; 5 David Conv. 212, *et seq.*, 3rd edit., pt. 1.

(b) Woodf. L. & T. 173, 16th edit.; Redm. & Ly. L. & T. 441, 4th edit.

(c) *Ante*, p. 333.

(d) *Meux v. Cobley*, (1892) 2 Ch. 253; 61 L. J. 449, Ch.

(e) *Rayner v. Stone*, 2 Eden, 128; *Phipps v. Jackson*, 56 L. J. 550, Ch.; 35 W. R. 378.

the work and if the intended lessee fails to complete within the time specified, that the landlord may re-enter and resume possession as of his former estate without any allowance to the intended lessee. (6) That the intended lessee will accept a lease of the premises on the foregoing terms and conditions, and execute a counterpart thereof, and pay the costs of the agreement and lease. Sometimes a proviso is added that the agreement shall not operate as a demise. And other special provisions as to roads, drains, and the like may be necessary.(a)

The lease to be granted under the agreement, after the date and parties, contains the *testatum* which states that in consideration of the moneys which had been expended by the lessee in the construction of the dwelling-house, and in consideration of the rent reserved and the covenants by the lessee thereafter contained, the lessor demises the parcels, &c. Then follow the *habendum*, *reddendum*, and the covenants stipulated for by the agreement on the tenant's part, also the provisoes; with a covenant by the lessor for quiet enjoyment.(b) However, the lease may be granted without a previous agreement.

As to the specific performance of an agreement to build, see *ante*, p. 307.

Where a building lease is granted by a tenant for life under the Settled Land Acts, 1882 to 1890, the lease must be made in accordance with the provisions thereof, which are set out, *ante*, p. 286. And when granted by a mortgagor or mortgagee, under the authority of the Conveyancing Act, 1881, s. 18, the lease must be in accordance with the provisions of that statute, set out *ante*, p. 194.

Restrictive Covenants.

Amongst the covenants inserted in a lease of a private dwelling-house on the lessee's part there are usually two termed restrictive covenants, which are: (1) that the lessee shall not use the premises, if a dwelling-house, for any trade or business, &c., or, if not a dwelling-house, will not carry on some particular trade or trades; and (2) shall not assign, or even underlet, the premises without the previous consent of the lessor.

1. As to the first-mentioned covenant, it has long been decided that "trade" and "business" used therein are not synonymous. A trade has been held to be limited to buying and selling;(c) whereas business has a more extended application. Thus, keeping a school has been held to be a breach of a covenant not to carry on in the demised premises any business;(d) it is also a breach thereof to use them as a charitable institution for the board and education of girls.(e)

And a covenant not to use a house "for any trade or manufacture, or for any other purpose than a private dwelling-house," is broken by using

(a) See forms, 3 Byth. & Jarm. 388, 4th edit.; 5 David Conv. 60, pt. 1, 3rd edit.

(b) 5 David. Conv. 142, pt. 1, 3rd edit. (c) *Doe v. Bird*, 2 Ad. & E. 161.

(d) *Kemp v. Sober*, 1 Sim. N. S. 517; *Wickenden v. Webster*, 6 E. & B. 387; 25 L. J. 264, Q. B.

(e) *Rolls v. Miller*, 27 Ch. Div. 71; 53 L. J. 682, Ch.; 50 L. T. Rep. N. S. 597; 32 W. R. 806.

it as a boarding-house for scholars attending a school in the neighbourhood.(a)

A stipulation that the premises shall not be used for a certain specified trade or business, as a school, does not imply a restriction against carrying on other trades.(b)

A covenant "not to do any act which may be or grow to the annoyance, &c., of the lessor or the inhabitants of the neighbouring houses" is broken by the establishment of a hospital for diseases, which may cause sensible people to feel a reasonable apprehension of risk.(c)

A covenant not to use the premises as a public-house, tavern, or beer-house, is not broken by opening a shop for the sale of beer in retail to be drunk off the premises;(d) but it is otherwise if the covenant were not to use the premises as a beershop, for beerhouse means a place where beer is sold to be consumed on the premises, whereas beershop is a place where beer is sold to be consumed off the premises.(e) A covenant not to use the premises "for the sale of spirituous liquors" was held to forbid the sale by a grocer of spirituous liquors in bottle.(f) Where, however, the covenant was that the "trade of hotel-keeper, &c., or seller by retail of wine, beer, or spirituous liquors," should not be carried on upon the premises, the covenant was held not to be broken by the sale of wine and spirits in bottles by a grocer (under an Act passed after the date of the lease); for the covenant was in this case evidently intended to apply to the case of a gin palace, or the like, and not against the trade of a winemerchant.(g)

A covenant analogous to the foregoing is a covenant imposed by a landlord on his tenant to deal exclusively with a particular person; and such covenants are not illegal as being in restraint of trade.(h) They are usually inserted in leases of public-houses, and stipulate that the tenant shall purchase his beer, &c., of the landlord. Such a public-house is termed a "tied" house. The covenant is only binding so long as the beer, &c., is of a good marketable quality.(i)

(a) *German v. Chapman*, 7 Ch. Div. 271; 47 L. J. 250, Ch.; 37 L. T. Rep. N. S. 685; *Hobson v. Tulloch*, (1898) 1 Ch. 424; 67 L. J. 205, Ch.; 78 L. T. Rep. N. S. 224; 46 W. R. 331.

(b) *Van v. Corpe*, 3 My. & K. 269; 6 L. J. 208, Ch.

(c) *Tod-Heatley v. Benham*, 40 Ch. Div. 80; 58 L. J. 83, Ch.; 60 L. T. Rep. N. S. 241; 37 W. R. 38.

(d) *Holt v. Collyer*, 16 Ch. Div. 718; 50 L. J. 311, Ch.; 44 L. T. Rep. N. S. 214; 29 W. R. 502.

(e) *Bishop of St. Albans v. Battersby*, 3 Q. B. Div. 359; 47 L. J. 571, Q. B.; 26 W. R. 679; *London and Suburban Land Co. v. Field*, 16 Ch. Div. 645; 50 L. J. 549, Ch. 44 L. T. Rep. N. S. 444.

(f) *Feilden v. Slater*, L. R. 7 Eq. 523; 38 L. J. 379, Ch.; 17 W. R. 485; and see *Fitz v. Iles*, (1893) 1 Ch. 77; 62 L. J. 258, Ch.

(g) *Jones v. Bone*, L. R. 9 Eq. 674; 39 L. J. 405, Ch.; 23 L. T. Rep. N. S. 304; 18 W. R. 489.

(h) *Catt v. Tourle*, 4 Ch. App. 654; 38 L. J. 401, 665, Ch.; *Savill v. Langman*, 79 L. T. Rep. N. S. 44.

(i) *Holcombe v. Hewson*, 2 Camp. 391; *Thornton v. Sherratt*, 8 Taunt. 529; *Luker v. Dennis*, 7 Ch. Div. 227; 47 L. J. 174, Ch.

Such a covenant as the above is one touching the land and runs with the land, and is binding on the assignee of the lessee.(a) And the covenant may also be enforced by an assignee of the lessor.(b)

2. As to the second restrictive covenant, it is usually provided in a lease of a dwelling-house, in order to prevent the *prima facie* right of the tenant to assign the premises, that he shall not assign or underlet them without the previous licence of the lessor. But it should be remembered that such a covenant could not be inserted in a lease of a house or other premises where the agreement for the lease merely stipulates that the lease shall contain all "usual covenants."(c) And where the lease contains a covenant not to assign without a licence, it is not broken by an involuntary assignment, as where the premises are taken by a railway company under its compulsory powers;(d) nor is the covenant broken by an assignment by operation of law, as where the lease passes to the executor or administrator, not by bequest. Yet, if the lessee covenants for himself, his executors and administrators, not to assign, they cannot assign without consent.(e) So where the lease passes to the trustee in bankruptcy on the lessee becoming bankrupt, it is no breach of the covenant, and the trustee may assign the lease(f) subject to any proviso for re-entry on this ground.(g) But it is broken by an assignment of the lease for the benefit of creditors generally.(h) A covenant not to assign is not broken by an underlease.(i) But where a lessee covenanted not to assign or otherwise part with the premises for the whole or any part of the term, and then granted an underlease out of the term, the covenant was held to be broken.(k) And an instrument framed as an underlease ending on the same date as the original term amounts to an assignment.(l) A covenant not to assign is not broken by merely depositing the lease by way of equitable mortgage.(m) Whether the covenant is broken by a bequest of the term is not clear, as the decisions are conflicting, but the balance of authority seems to be that it is not.(n)

(a) *White v. Southend Hotel Co.*, (1897) 1 Ch. 767; 66 L. J. 387, Ch.; 76 L. T. Rep. N. S. 273; 45 W. R. 434.

(b) *Clegg v. Hands*, 44 Ch. Div. 503; 59 L. J. 477, Ch.; 62 L. T. Rep. N. S. 502; 38 W. R. 433; *John Brothers Abergarw Brewery Co. v. Holmes*, (1900) 1 Ch. 188; but see *Birmingham Breweries v. Jameson*, 78 L. T. Rep. N. S. 512; 67 L. J. 403, Ch.

(c) *Ante*, p. 316.

(d) *Slipper v. Tottenham, &c., Ry. Co.*, L. R. 4 Eq. 112; 36 L. J. 841, Ch.; 16 L. T. Rep. N. S. 446; 15 W. R. 861.

(e) *Roe v. Harrison*, 2 T. R. 425.

(f) *Doe v. Bevan*, 3 M. & S. 353.

(g) *Horsley Estate v. Steiger*, 68 L. J. 743, Q. B.; (1899) 2 Q. B. 79; 80 L. T. Rep. N. S. 857, C. A.

(h) *Gentle v. Faulkner*, 68 L. J. 848, Q. B.; 81 L. T. Rep. N. S. 294.

(i) *Cruso v. Bugby*, 3 Wil. 235.

(k) *Doe v. Worsley*, 1 Camp. 20; *Dymock v. Showells Brewery Co.*, 79 L. T. Rep. N. S. 329.

(l) *Beardman v. Wilson*, L. R. 4 C. P. 57; 38 L. J. 91, C. P.; 19 L. T. Rep. N. S. 282.

(m) *Doe v. Hogg*, 4 D. & Ry. 226.

(n) See Will. Exors. 809, n., 9th edit.; Woodf. L. & T. 698, 15th edit.

An assignment by one of two joint tenants to the other is a breach of such a covenant.(a)

It is sometimes provided that the licence or consent to the assignment shall not be arbitrarily or unreasonably withheld. This does not amount to a covenant by the lessor, express or implied, not to refuse his consent arbitrarily, but an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent.(b)

If it is stipulated that the consent shall be in writing, a verbal consent is not sufficient.(c)

Where the assignment or underlease is made without first obtaining the necessary consent, the fact that the new tenant is an eligible tenant does not make any difference; a forfeiture is still incurred under the proviso for re-entry.(d)

By 55 & 56 Vict. c. 13, in leases containing a stipulation against assigning or underletting, &c., the property leased without licence or consent, such stipulation is, unless the lease contains an expressed proviso to the contrary, to be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine should be payable for or in respect of such licence or consent; but this is not to preclude the right to the payment of a reasonable sum for legal or other expenses in relation to the licence (sect. 3). And the lessor of a building lease may demand as a condition for such a licence that the lessee shall deposit a sum of money as security for the due performance of the unperformed part of the building contract; that not being a fine or sum of money in the nature of a fine, &c.(e)

The lessor's remedies for breach of a restrictive covenant are by action for an injunction, or for damages, or by re-entry under a power contained in the lease.

Formerly, if a lease contained a covenant not to alien without licence, and a licence was given, that waived the condition itself, and in future no licence was required.(f) But by 22 & 23 Vict. c. 35, a licence to do an act, as to assign or underlet, which, without such licence, would create a forfeiture or give a right to re-enter under a condition or power in the lease, extends, unless otherwise expressed, only to the actual assignment or underlease thereby specifically authorised, leaving intact all rights and remedies of the lessor as to any subsequent breach, &c. (sect. 1); and a licence similarly given to one of several lessees to assign or underlet his part of the demised property will not affect the lessor's right of re-entry upon breach of the covenant by the others (sect. 2).

(a) *Varley v. Coppard*, L. R. 7 C. P. 505; 26 L. T. Rep. N. S. 882.

(b) *Treloar v. Bigge*, L. R. 9 Ex. 151; 43 L. J. 95, Ex.; 22 W. R. 843; *Sear v. House Property, &c., Society*, 16 Ch. Div. 387; 50 L. J. 77, Ch.; 29 W. R. 192.

(c) *Roe v. Harrison*, 2 T. R. 425.

(d) *Barrow v. Isaacs*, (1891) 1 Q. B. 417; 60 L. J. 179, Q. B.; 64 L. T. Rep. N. S. 686; 39 W. R. 338; *Eastern Telegraph Co. v. Dent*, 78 L. T. Rep. N. S. 713; 80 *Id.*, 459; 68 L. J. 564, Ch.; (1899) 1 Q. B. 835, C. A.

(e) *Re Cosh*, 66 L. J. 28, Ch.; 75 L. T. Rep. N. S. 365; (1897) 1 Ch. 9.

(f) *Dumpor's Case*, 1 Sm. L. C. 43, 9th edit.

A covenant against assignment or sub-letting without consent runs with the land, if the lessee covenants for himself and his assigns. And the measure of damages for breach thereof is such a sum as will put the landlord in the same position as if he still had the lessee's liability, instead of the liability of another of inferior pecuniary ability, for past and future breaches.(a) So the proviso for re-entry in case of bankruptcy or liquidation runs with the land.(b)

The Court will not grant relief against a forfeiture occasioned by breach of the covenant against assignment without consent, even when the omission to ask for the lessor's consent is occasioned by the mistake of the lessee's solicitor.(c)

Covenants for Renewal.

In framing covenants for renewal the draftsman should be careful to express clearly the terms upon which the renewed lease is to be granted, and state whether the renewed lease is also to contain a similar covenant for renewal. The covenant should also state whether the renewal is to be optional with the lessee or compulsory, and whether it is to be personal to himself or go to his executors, administrators, or assigns.(d) If a perpetual renewal is intended, this must be expressly stated, as a covenant for renewal of a lease upon the same covenants extends only to a second lease, and not to a perpetuity of leases. For it has been said that the court leans against a construction for perpetual renewal unless clearly intended.(e) And it has more recently been held that the burden of strict proof is imposed upon anyone claiming the right of perpetual renewal, and the courts are strongly against inferring it from any equivocal expressions in the deed which may fairly be capable of being otherwise interpreted.(f)

The right to renewal may be forfeited by the tenant not applying for a renewal within the time mentioned.(g) And where the right is subject to a condition precedent the condition must be performed before a renewal can be claimed.(h)

On the surrender of a lease for the purpose of renewal it is no longer necessary that any underleases granted out of the lease should also be

(a) *Williams v. Earle*, L. R. 3 Q. B. 739; 37 L. J. 231, Q. B.; 19 L. T. Rep. 80 L. T. N. S. 238; 16 W. R. 1041.

(b) *Horsey Estate v. Steiger*, 68 L. J. 743, 750, Q. B.; (1899) 2 Q. B. 79; Rep. N. S. 857, C. A.

(c) See 44 & 45 Vict. c. 41, s. 14 (6, i); *Barrow v. Isaacs*, and *Eastern Telegraph Co. v. Dent*, *supra*, p. 342.

(d) 5 David. Conv., pt. 1, 140, 3rd edit.

(e) *Moore v. Foley*, 6 Ves. 233; *Baynham v. Guy's Hospital*, 3 Ves. 294.

(f) *Swinburne v. Milburn*, 9 App. Cas. 844; 33 W. R. 325; 52 L. T. Rep. N. S. 222; 54 L. J. 6, Q. B.

(g) *Baynham v. Guy's Hospital*, *sup.*

(h) *Job v. Bannister*, 2 K. & J. 374; 26 L. J. 125, Ch.; *Finch v. Underwood*, 2 Ch. Div. 310; 45 L. J. 522, Ch.; 34 L. T. Rep. N. S. 779; 24 W. R. 657; *Bastin v. Bidwell*, 18 Ch. Div. 238; 44 L. T. Rep. N. S. 742.

surrendered and renewed in order to preserve the lessee's rights against his under tenants as it was formerly ;(a) for 4 Geo. 2, c. 28 provides that when a lease is surrendered in order to be renewed the new lease shall, without a surrender of the underleases, be as valid for all purposes as if the underleases had been likewise surrendered at the time of taking the new lease (sect. 6). And 8 & 9 Vict. c. 106 enacts that when a reversion expectant on a lease is surrendered, the estate which confers as against the tenant the next vested right to the tenements shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (sect. 9). By 56 & 57 Vict. c. 53, s. 19, a trustee of renewable leaseholds for lives or years may renew the same, and must, if required by any person having a beneficial interest therein, endeavour to do so, and for such purpose may surrender the subsisting lease, and if he has not money in hand to pay for such renewal he may raise the money by mortgage of the trust premises.

Proviso for Re-entry—Forfeiture.

A proviso or condition giving the lessor power to re-enter in case the rent remains unpaid for a certain time, or on breach of any of the lessee's covenants, is usually inserted in the lease after the lessee's covenants. But it has already been shown (*ante*, p. 316) that under an agreement for a lease to contain all usual and customary clauses the lessor is not entitled to have a condition of re-entry inserted for breach of any other covenant than that for payment of rent.

An estate granted on condition subsequent does not, on breach of the condition, cease, but must be avoided by entry or action.(b) And a condition must be distinguished from a covenant, for subject to the right of relief from forfeiture now given by statute(c), upon breach of a condition the lessor may re-enter; whereas a breach of covenant gives only the right to recover damages, or obtain an injunction, unless the right to re-enter is expressly reserved to him by the lease.(d) It is not necessary to use the word "condition"; and the word commonly used is "provided."(e)

Although the 8 & 9 Vict. c. 106 provides that a right of re-entry into or upon any tenements may be disposed of by deed (sect. 6), it has nevertheless been held that this does not apply to a right to re-enter for breach of a condition in a lease.(f)

Before a landlord could re-enter for non-payment of rent, he was by the common law obliged to make an actual demand of the precise rent due

(a) 3 Byth. & Jar. Conv. 299, 4th edit.

(b) 2 Bl. Com. 155; Woodf. L. & T. 337, 16th edit.

(c) See *post*.

(d) See 3 Byth. & Jar. Conv. 251, 4th edit.; Foa, L. & T. 237, 2nd edit.; Redm. & Ly. L. & T. 359, 4th edit.

(e) Woodf. L. & T. 192, 15th edit.

(f) *Hunt v. Bishop*, 8 Ex. 675; 22 L. J. 337, Ex.; see also *Bennett v. Herring*, 3 C. B. N. S. 370.

on the precise day before sunset upon the land.(a) These formalities, however, were usually obviated by express stipulation in the proviso. And now by 15 & 16 Vict. c. 76, when half a year's rent is in arrear, and the landlord has a right to re-enter for non-payment thereof, he may, without any formal demand or re-entry, serve a writ in ejectment, and on proof that half a year's rent was due before service of the writ, and no sufficient distress on the premises, and that he had a right to re-enter, he is entitled to judgment and execution (sect. 210).

Acceptance of rent accruing due after a forfeiture with notice thereof operates as a waiver of the forfeiture;(b) but not an acceptance of rent due at the time of the forfeiture.(c) Distraining for rent,(d) or suing for rent becoming due after the forfeiture with notice thereof, has the same operation by way of waiver as an acceptance of rent;(e) but where the forfeiture is occasioned by the breach of a covenant which is a continuing breach, as of the covenant to repair, and after notice to repair has been given under sect. 14 of the Conveyancing Act, 1881 (*post*, p. 346), and the breach continues after the rent becomes due, suing for such rent is not a waiver of the forfeiture, although the notice was given and expired before the rent became due.(f) And where after realisation of a distress for rent half a year's rent still remains due, the distress does not prevent the landlord from proceeding under sect. 210 of 15 & 16 Vict. c. 76, stated *supra*.(g)

At common law an express waiver of a condition destroyed the condition itself, as the condition was considered entire and indivisible;(h) but now by 23 & 24 Vict. c. 38, where an actual waiver of the benefit of a covenant or condition in a lease by the lessor, or his heirs, &c., is proved, such waiver is not to extend to any instance or breach other than that to which such waiver specifically relates, unless an intention to the contrary appears (sect. 6). And by 22 & 23 Vict. c. 35, as already shown, a licence to commit a breach of covenant or condition which formerly destroyed the right of re-entry is now confined to the licence actually given, &c., unless otherwise expressed (sect. 1). And by sect. 2, a licence similarly given to one of several lessees to do an act, &c., is not to operate to destroy the right of re-entry in case of breach of the covenant or condition by the co-lessee, &c.

Equity would from an early period relieve against forfeiture for non-payment of rent;(i) and by 15 & 16 Vict. c. 76 (amended by 23 & 24

(a) 1 Wms. Saund. 287 n. 16; Redm. & Ly. L. & T. 368, 4th edit.

(b) *Arnsby v. Woodward*, 6 B. & C. 519.

(c) *Price v. Worwood*, 4 H. & N. 512; 28 L. J. 329, Ex.

(d) *Cotesworth v. Spokes*, 10 C. B. N. S. 103; 30 L. J. 220, C. P.; *Walrond v. Hawkins*, L. R. 10 C. P. 342; but see *infra*.

(e) *Dendy v. Nicholl*, 4 C. B. N. S. 376; 27 L. J. 220, C. P.

(f) *Penton v. Barnett*, 67 L. J. 11 Q. B.; 77 L. T. Rep. N. S. 645; (1898) 1 Q. B. 276.

(g) *Thomas v. Lulham*, (1895) 2 Q. B. 400; 64 L. J. 720, Q. B.; 43 W. R. 338.

(h) *Dumpro's Case*, 1 Sm. L. C. 43, 9th edit.

(i) Storey's Eq. s. 1315.

Vict. c. 126, s. 1), a tenant may stay all further proceedings against him by paying or tendering the arrears of rent and costs at any time before trial (sect. 212). And even after execution, executed on a judgment in ejectment, the lessee might obtain relief by applying to the Court or judge within six calendar months thereafter on payment of the arrears of rent and full costs (sect. 210; 23 & 24 Vict. c. 126, s. 1).

And now by the Conveyancing Act, 1881, s. 14, a right of re-entry or forfeiture under a stipulation in a lease for breach of any covenant or condition therein is not to be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is remediable, requiring him to remedy it, and in any case requiring him to make compensation in money for such breach, and the lessee fails within a reasonable time thereafter to comply with the terms of the notice (sub-sect. 1). Notwithstanding the words of the section it has been held that the notice need not claim compensation if the lessee does not want any, and is not bad for not doing so.^(a)

And where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, or in any action brought by himself, apply to the High Court^(b) for relief, which the Court may grant or refuse; and in case of relief may grant it on such terms, if any, as to costs, damages, or otherwise, including an injunction against any like breach in the future, as the Court thinks fit (sub-sect. 2).

An underlease as well as an original lease is within this action; also a grant at a fee farm rent, or securing a rent by condition; and an underlessee as well as an original lessee is included, and lessor includes an underlessor, &c. (sub-sect. 3). And the section also applies through the right of re-entry, or forfeiture accrues under a stipulation inserted in a lease in pursuance of a statute (sub-sect. 4).

By the combined operation of the Conveyancing Acts, 1881 and 1892 (44 & 45 Vict. c. 41, s. 14, sub-s. 6, and 55 & 56 Vict. c. 13, s. 2, sub-s. 2, and 3), no relief is to be granted when (1) the covenant or condition is against assigning or underletting, &c., the land leased; or (2) is a condition for forfeiture on bankruptcy of the lessee, or on the taking of his interest in execution, if he has allowed a year to elapse thereafter before applying for relief, and his interest is not sold within the year.

That is as to exception (2), sect. 14 (6) of the Act of 1881 excludes relief in case of a condition for forfeiture on the lessee's bankruptcy, or taking in execution his interest; but sect. 2 (2) of the Act of 1892 provides that sub-sect. 6 of sect. 14 of the Act of 1881 is to apply to such a condition, &c., only after the expiration of one year from the date of the bankruptcy, &c., and provided the lessee's interest is not sold within the year. But sect. 2 (3) of the Act of 1892 provides that sub-sect. 2 of the

(a) *Lock v. Pearce*, (1893) 2 Ch. 271; 62 L. J. 582, Ch.; 68 L. T. Rep. N. S. 569; 41 W. R. 369.

(b) See *Lock v. Pearce* sup.

section is not to apply to any lease of (i.) agricultural or pastoral land ; (ii.) mines or minerals ; (iii.) a public-house or beershop ; (iv.) a furnished house ; (v.) any property with respect to which the personal qualifications of the tenant are of importance for its preservation, &c. (sect. 2, sub-sect. 3). Therefore, in these cases the year need not elapse, &c., to exclude the effect of sub-sect. 6 of sect. 14 of the Act of 1881. (3) The Act of 1881, sect. 14, sub-sect. 6, further excludes relief in case of a mining lease where the covenant or condition is for allowing the lessor to inspect books, accounts, weighing machines, &c.

By the Act of 1881, sect. 14, sub-sect. 8, the section is not to affect the law relating to re-entry, &c., for non-payment of rent.

The notice under sect. 14 (1) must be in writing (sect. 67), and must specify the particular breaches complained of with sufficient clearness to enable the lessee to remedy them.(a)

A lessee cannot obtain relief under sect. 14 of the Act of 1881 after the lessor has actually obtained possession of the premises before application for relief is made.(b)

It has already been stated that a proviso for re-entry in case of bankruptcy or liquidation runs with the land.(c)

It will be remembered that sub-sect. 3 of sect. 14 of 44 & 45 Vict. c. 41 enacts that for the purposes of the section a lease is to include an underlease and lessee an underlessee, &c. ; but it has been held that sub-sects. 1 to 3 do not enable an underlessee of the premises, as between himself and the original lessor, to obtain relief. The true reading of the sub-sections being that when an original lessor proceeds by way of forfeiture against an original lessee, or a derivative lessor so proceeds against a derivative lessee, the relieving provisions of sect. 14 come into force, but not otherwise ; and if there be an underlessee, and an original lessor proceeds against an original lessee for a forfeiture, and thus breaks the head lease, the underlessee cannot avail himself of the section.(d)

However, by 55 & 56 Vict. c. 13, s. 4, where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under a stipulation in a lease, the Court may, on the application of an underlessee of any estate or interest in the property leased or any part thereof, either in the lessor's action or in one brought by the underlessee, make an order vesting for the whole term, or any less term (not exceeding that of the original sub-lease) the property leased or any part thereof in the underlessee, upon such conditions as to execution of deeds or

(a) *Fletcher v. Nokes*, (1897) 1 Ch. 271 ; 66 L. J. 177, Ch. ; 76 L. T. Rep. N. S. 107 ; 45 W. R. 471 ; *Re Serle*, 78 L. T. Rep. N. S. 384 ; 67 L. J. 344, Ch. ; (1898) 1 Ch. 652.

(b) *Rogers v. Rice*, (1892) 2 Ch. 170 ; 61 L. J. 573, Ch. ; 66 L. T. Rep. N. S. 640 ; 40 W. R. 489.

(c) See *ante*, p. 343.

(d) *Cresswell v. Davidson*, 56 L. T. Rep. N. S. 811 ; *Burt v. Gray*, (1891) 2 Q. B. 98 ; 60 L. J. 664, Q. B. ; 65 L. T. Rep. N. S. 229 ; 39 W. R. 429 ; *Nind v. Nineteenth Century Building Society*, (1894) 2 Q. B. 226 ; 63 L. J. 636, Q. B. ; 70 L. T. Rep. N. S. 831 ; 42 W. R. 481.

documents, payment of rent, costs, damages, or otherwise, as the Court thinks fit (sect. 4). The foregoing section enables the Court to relieve an underlessee where it could not grant relief to the lessee himself ;(a) provided such underlessee has not been guilty of such negligence as disentitles him to relief.(b)

It was also held that lease in sect. 14 of 44 & 45 Vict. c. 41 did not include an agreement for a lease, unless it was one of which specific performance would be granted.(c) By 55 & 56 Vict. c. 13, s. 5, however, it is provided that in sect. 14 of the Conveyancing Act, 1881, and in this Act "lease" is to include an agreement for a lease where the lessee has become entitled to have his lease granted, and "underlease" is to include an agreement for an underlease where the underlessee has become entitled to have his underlease granted.

It was also held, under sect. 14 of the Act of 1881, that the lessor could not recover the costs of his solicitor and surveyor, in addition to damages, if any, caused by the breach.(d) But by 55 & 56 Vict. c. 13, s. 2, a lessor is to be entitled to recover as a debt due from the lessee, in addition to any damages, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor, or otherwise in reference to a breach giving rise to a right of re-entry or forfeiture which, at the lessee's request, is waived by the lessor by writing, or from which the lessee is relieved under the Conveyancing Act (sub-sect. 1). But it has been held on the construction of this subsection and sect. 4 that an underlessee is not, as between himself and the original lessor, a "lessee" within their meaning, and therefore the lessor cannot recover from him the costs and expenses of a solicitor and surveyor, &c.(e)

Covenant for quiet Enjoyment.

We have yet to treat of the covenant entered into by the lessor, which, in the absence of express stipulation, is one for quiet enjoyment by the lessee. If the lessor does not enter into an express covenant for quiet enjoyment, the law will imply such a covenant from proper words of demise, whether the lease be under seal or not. Thus the word "demise" in a lease for years under seal will create such a covenant; and the word "let" seems to have the same effect.(f) And it seems the word

(a) *Cholmelly School v. Sewell*, (1894) 2 Q. B. 906; 63 L. J. 820, Q. B.; 71 L. T. Rep. N. S. 88.

(b) *Imray v. Oakshett*, 66 L. J. 545, Q. B.; 76 L. T. Rep. N. S. 632; (1897) 2 Q. B. 218, C. A.

(c) *Swain v. Ayres*, 21 Q. B. Div. 289, stated *ante*, p. 307.

(d) *Skinnors Co. v. Knight*, (1891) 2 Q. B. 542; 60 L. J. 629, Q. B.

(e) *Nind v. Nineteenth Century Building Society*, (1894) 2 Q. B. 226; 63 L. J. 636, Q. B.; 70 L. T. Rep. N. S. 831; 42 W. R. 481.

(f) *Hart v. Windsor*, 12 M. & W. 68, 85; *Penfold v. Abbott*, 7 L. T. Rep. N. S. 384; 32 L. J. 67, Q. B.; 11 W. R. 169; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. Div. 145, 152; 45 L. J. 401, C. P.; 34 L. T. Rep. N. S. 325; *Baynes v. Lloyd*, (1895) 2 Q. B. 610; 64 L. J. 787, Q. B.

“demise” in a lease under seal also imports a covenant in law that the lessor has a good title.(a)

But the weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from the use of words in the lease as above mentioned.(b)

If there be an express covenant for quiet enjoyment that will supersede any implied covenant to that effect.(c) And the implied covenant ceases with the estate of the lessor. Hence a yearly tenant has been held not to be entitled to sue his landlord on an implied covenant, who was proved to have only a term of years in the demised premises, upon eviction by the head landlord when that term came to an end.(d) And such a covenant applies only to the lawful, and not to the wrongful acts, evictions, or interruptions of strangers, because against tortious acts the lessee has his remedy against the wrongdoers;(e) however, the implied covenant extends to the acts not only of the lessors but of all persons having lawful title; whereas the express covenant is usually restricted to the acts of the lessor, and those rightfully claiming from or under him;(f) but it endures during the whole term granted.(g)

As instances of persons claiming under the covenant, within the above restricted covenant, it has been held that a person claiming under a settlement giving the lessor power to lease, is a person claiming under the lessor;(h) so is a person claiming under a prior lease of the demised premises.(i) On the other hand, when the covenant is restricted as above, it will not extend to an eviction by a person claiming by a title paramount.(k)

Where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor or those lawfully claiming under him, the covenant is broken, although neither the title to the land nor the possession of the land may be otherwise affected.(l) It is a breach of the covenant for quiet enjoyment for the lessor to give notice to a sub-tenant of the lessee to pay rent to him;(m) but it is not a

(a) See Woodf. L. & T. 718, 16th edit., and references *supra*.

(b) *Baynes v. Lloyd*, (1895) 2 Q. B., at p. 615.

(c) *Merrill v. Frame*, 4 Taunt. 329; *Baynes v. Lloyd*, *sup.*

(d) *Penfold v. Abbott*, *sup.*; *Schwartz v. Locket*, 61 L. T. Rep. N. S. 719; 38 W. R. 142; *Baynes v. Lloyd*, *sup.*

(e) *Hays v. Bickerstaff*, Vaugh. 118; Platt, Covts. 313; Woodf. L. and T. 713, 15th edit.

(f) 5 David Conv. 111, pt. 1, 3rd edit.

(g) *Evans v. Vaughan*, 4 B. & C. 261; *Lock v. Furze*, L. R. 1 C. P. 441; 35 L. J. 141, C. P.; 15 L. T. Rep. N. S. 161; 14 W. R. 403.

(h) *Evans v. Vaughan*, *sup.*

(i) *Rolph v. Crouch*, L. R. 3 Ex. 44; 37 L. J. 8, Ex.; 17 L. T. Rep. N. S. 249; 16 W. R. 252.

(k) *Merrill v. Frame*, 4 Taunt. 329.

(l) *Sanderson v. Mayor of Berwick*, 13 Q. B. Div. 547; 53 L. J. 559; Q. B.; 51 L. T. Rep. N. S. 495; 33 W. R. 67.

(m) *Edge v. Boileau*, 16 Q. B. Div. 117; 55 L. J. 90, Q. B.; 53 L. T. Rep. N. S. 907; 31 W. R. 108.

breach of such a covenant because a nuisance is committed on an adjoining property of the lessor.(a)

The measure of damages on eviction of the lessee is the value of what he has lost by the eviction, and the costs and expenses to which he has been put.(b) But where there has been no eviction the damages are only the damages actually sustained.(c)

Prior to the Judicature Acts it was held that under a mere agreement for a lease there was no implied covenant for quiet enjoyment.(d) But now where the tenant is in possession under an agreement for a lease, of which specific performance would be granted, he stands, it seems, in the same position as if the lease had been granted.(e) And prior to the Judicature Acts, under an agreement for a lease an undertaking was implied that the lessor had a good title to let, upon which an action lies.(f)

Warranty of Fitness.

Apart from contract, there is no duty cast upon a landlord as between himself and his tenant to see that an unfurnished house let to the tenant is in a proper condition at the commencement of the term.(g) Nor is there at common law any implied warranty that such a house is fit for habitation.(h) An exception as to implied warranty of an unfurnished house is made by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), in the cases of houses let to the poor, under sect. 75 of which there is an implied condition that the house is at the commencement of the holding fit for human habitation.

And in regard to the letting of furnished houses the rule as to warranty is different to that as to unfurnished houses, being in this case a mixed contract for lands and goods, and there is an implied condition or warranty that the house is reasonably fit for occupation at the time the tenancy is to begin;(i) but there is no implied warranty that it shall continue fit for habitation during the term,(k) as has sometimes been stated, from an ex-

(a) *Jenkins v. Jackson*, 40 Ch. Div. 71, 76; 58 L. J. 124, Ch.; 60 L. T. Rep. N. S. 105; 37 W. R. 253.

(b) *Williams v. Burrell*, C. B. 402; 14 L. J. 98, C. P.; *Lock v. Furse*, L. R. 1 C. P. 441; *ante* p. 349.

(c) *Child v. Stenning*, 11 Ch. Div. 82; 48 L. J. 392, Ch.; 40 L. T. Rep. N. S. 302; 27 W. R. 462.

(d) *Brashier v. Jackson*, 6 M. & W. 549.

(e) See *ante*, p. 279.

(f) *Stranks v. St. John*, L. R. 2 C. P. 376; 36 L. J. 118, C. P.; 16 L. T. Rep. N. S. 283; 15 W. R. 678.

(g) *Robbins v. Jones*, 15 C. B. N. S. 221; 33 L. J. 1, C. P.; *Lane v. Cox*, (1897) 1 Q. B. 415; 66 L. J. 193, Q. B.; 76 L. T. Rep. N. S. 135; 45 W. R. 261, C. A.; but see *Miller v. Hancock*, (1893) 2 Q. B. 177; 69 L. T. Rep. N. S. 214; 41 W. R. 578.

(h) *Hart v. Windsor*, 12 M. & W. 68.

(i) *Smith v. Marable*, 11 M. & W. 5; 12 L. J. 223, Ex.

(k) *Sarson v. Roberts*, (1895) 2 Q. B. 395; 65 L. J. 87, Q. B.; 73 L. T. Rep. N. S. 174; 43 W. R. 690.

pression used by Kelly, C.B., in his judgment in *Wilson v. Finch Hatton*.^(a) The condition is broken if the unfitness arises from defective drainage,^(b) or from the house being infested with bugs,^(c) or dangerous on the ground of infection,^(d) and the tenant is justified in repudiating the tenancy.

The preparation and cost of Lease and Counterpart, and of Completion.

It is the custom for the lessor's solicitor to prepare the lease at the expense of the lessee. The lessor is, however, liable to his solicitor in the first instance, and may recover the amount from the lessee.^(e) But in the absence of agreement the expense of the counterpart must be borne by the lessor.^(f)

The amount of charges which the solicitor can make in respect of leases and agreements is now regulated by the general order (1882) made under the Solicitors Remuneration Act, 1881, which will be found *post*.

The draft lease having been prepared, the lessor's solicitor makes a fair copy of it, and forwards the fair copy to the solicitor of the lessee, if one, for his perusal. In acting for the lessee a solicitor should see that the lease contains no clause not in accordance with the agreement that is prejudicial to his client; and if there be no agreement, that the lease contains nothing but the usual clauses, provisos, and covenants on the lessee's part; or, at least, he should point out to the lessee anything that may be objectionable, and take the written instructions of his client thereon.

The draft lease being approved is returned to the solicitor for the lessor, and is then engrossed by him, and the draft and engrossment are sent to the solicitor for the lessee for examination, and when this is done they are returned to the lessor's solicitor, and an appointment is made for completion.

On the day appointed for completion the lease is executed by the lessor and lessee, and if any fine is to be given it is paid, and the lease is handed to the lessee. If, however, there is a counterpart, the lease is executed by the lessor and the counterpart by the lessee; the lease being taken by the lessee, and the counterpart by the lessor.

As to the effect of the non-execution of a lease by the lessor see *ante*, p. 146.

Registration of Leases.

If the lease comprise property in Middlesex or Yorkshire, the lease may require registration in the local registry. Certain leases are, however, exempt as already^(g) shown. And as to Registration under the Land Transfer Acts and Rules, see *post* that title.

(a) 2 Ex. Div. 336, 343; 46 L. J. 489, Q. B.; 36 L. T. Rep. N. S. 473; 25 W. R. 537.

(b) *Wilson v. Finch Hatton*, sup.

(c) *Smith v. Marable*, sup.

(d) *Bird v. Greville*, Cab. and E. 317.

(e) *Grissell v. Robinson*, 3 Bing. N. C. 10; *Smith v. Clegg*, 27 L. J. 300, Ex.

(f) *Jennings v. Major*, 8 C. & P. 61; *Re Negus*, (1895) Ch. 73; 64 L. J. 79, Ch.; 71 L. T. Rep. N. S. 716; 43 W. R. 68.

(g) *Ante*, pp. 158, 161.

Stamps on Leases and Agreements for Leases.

The Stamp Act, 1891, (54 & 55 Vict. c. 39) Sched. imposes the following duties on a lease or tack :—

- (1) For any definite term not exceeding a year :—
Of any dwelling-house, or part thereof, at a rent not exceeding the rate of 10*l.* per annum

(2) For any definite term less than a year :—
(a) Of any furnished dwelling-house or apartments where the rent for such terms exceeds 25*l.*
(b) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid

(3) For any other definite term or for any indefinite term :—
Of any lands, tenements, or heritable subjects—
Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security :—
- £ s. d.
0 0 1

0 2 6

The same duty as a lease for a year at the rent reserved for the definite term.

In respect of such consideration

The same duty as a conveyance on a sale for the same consideration.

Where the consideration or any part of the consideration is any rent :
In respect of such consideration :
If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :

	If the term does not exceed 35 years, or is indefinite.	If the term exceeds 35 years, but does not exceed 100 years.	If the term exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding 5 <i>l.</i> per annum	0 0 6	0 3 0	0 6 0
Exceeding—			
5 <i>l.</i> and not exceeding 10 <i>l.</i>	0 1 0	0 6 0	0 12 0
10 <i>l.</i> „ „ 15 <i>l.</i>	0 1 6	0 9 0	0 18 0
15 <i>l.</i> „ „ 20 <i>l.</i>	0 2 0	0 12 0	1 4 0
20 <i>l.</i> „ „ 25 <i>l.</i>	0 2 6	0 15 0	1 10 0
25 <i>l.</i> „ „ 50 <i>l.</i>	0 5 0	1 10 0	3 0 0
50 <i>l.</i> „ „ 75 <i>l.</i>	0 7 6	2 5 0	4 10 0
75 <i>l.</i> „ „ 100 <i>l.</i>	0 10 0	3 0 0	6 0 0
100 <i>l.</i>			
For every full sum of 50 <i>l.</i> , and also for any fractional part of 50 <i>l.</i> thereof	0 5 0	1 10 0	3 0 0

(4) Of any other kind whatsoever not hereinbefore described ...

0 10 0

And by sect. 75, an agreement for a lease or tack, &c., of any lands or tenements for any term not exceeding 35 years or for any indefinite term is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement (sub-sect. 1); but a lease or tack made subsequently to, and in conformity with, such an agreement duly stamped is to be charged with the duty of sixpence only.

By sect. 76, where the consideration, or any part thereof, for which the lease or tack is granted, or agreed to be granted, consists of any produce or other goods, the value thereof is to be deemed a consideration in respect of which the lease, or tack, or agreement is chargeable with *ad valorem* duty, &c.

By sect. 77, a lease or tack, or agreement for a lease or tack, &c., is not to be charged with any duty in respect of any penal rent,^(a) &c., thereby reserved, or agreed to be reserved, or made payable or by reason of being made in consideration of the surrender of any existing lease, tack, or agreement, of or relating to the same subject-matter (sub-sect. 1).

And a lease made for any consideration whereby it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration (sub-sect. 2).

And no lease for a life or lives not exceeding three, &c., and no lease for a term absolute not exceeding twenty-one years granted by an ecclesiastical corporation, aggregate or sole, is to be charged with any higher duty than 35s. (sub-sect. 3).

An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased, is not to be charged with duty otherwise than as a lease or tack, in consideration of the additional rent thereby made payable (sub-sect. 5).

As a rule all stamp duties must be denoted by impressed stamps, but by the above statute the duty upon an instrument chargeable with duty as a lease or tack of (1) any dwelling-house, or part of a dwelling-house, for a definite term not exceeding a year at a rent not exceeding the rate of 10*l.* per annum; or (2) any furnished dwelling-house or apartments for any definite term less than a year (and upon the duplicate or counterpart of any such instrument) may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed. And every person who executes or prepares, &c., any such instrument (except letters or correspondence), which is not at or before the execution thereof, duly stamped, incurs a fine of 5*l.* (sect. 78).

As to the period within which a lease, not coming within the provisions of the above section, must be stamped after execution, and the penalty for not so stamping it, see *ante*, p. 155.

The counterpart of a lease is chargeable with the same duty as the

(a) See *ante*, p. 317.

lease itself where the duty on the latter does not amount to 5s., and in any other case a duty of 5s.(a)

A lease is not subject to an agreement stamp in addition to the lease stamp, because it reserves an option to the lessee to purchase the demised premises.(b)

The production of the counterpart of a lease duly stamped is sufficient to raise a presumption that there was an original lease duly stamped.(c)

Assignments of Leases, &c.

We have already (*ante*, p. 341) treated of the effect of a covenant or condition against assigning a lease; but it yet remains to consider what effect an assignment of the lease, when permitted, or of the reversion, has upon the original parties to the lease and their respective assignees (1) as to the covenants and conditions in the lease, and (2) as to the rent.

The Stat. Frauds (29 Car. 2, c. 3), s. 3, requires all leases, &c., not being copyhold, of any tenements to be assigned or surrendered by deed or note in writing, signed by the party so assigning or surrendering, or his agent duly authorised in writing, or by act and operation of law. And by 8 & 9 Vict. c. 106, an assignment of a chattel interest not being copyhold in any tenements is to be void at law unless made by deed (sect. 3). And it has been held that an assignment of a term must be by deed, though the lease itself be created by parol.(d) By an assignment the assignor parts with his whole interest in the premises.(e) If an assignment comprises lands in Middlesex or Yorkshire, it will, unless exempted by the Acts, require registration in the local registry, as shown *ante*, p. 157, *et seq.* And as to dealings with leasehold land registered under the Land Transfer Acts and Rules, see *post*, that title.

In order to create the relationship of landlord and tenant between the lessor and assignee there must be an actual assignment of the legal interest by the lessee. A mere agreement to assign, giving only an equitable title,(f) and an equitable assignment by a deposit of the lease by way of mortgage will not create such a privity between lessor and assignee as will make the latter liable on the covenants in the lease, even if he has entered into possession.(g) Nor can such assignee be compelled at the suit of the lessor to take a legal assignment.(h)

We will now consider the effect of an assignment as to the covenants in the lease. These covenants are of two kinds (1) those which touch or concern the thing demised and run with the land, and (2) those which are

(a) See 54 & 55 Vict. c. 39, s. 72, and Sched. tit. "Duplicate or counterpart."

(b) *Worthington v. Warrington*, 5 C. B. 635; 17 L. J. 117, C. P.

(c) See *ante*, p. 111.

(d) *Botting v. Martin*, 1 Camp. 318.

(e) 2 Bl. Com. 326.

(f) *Cox v. Bishop*, 8 De G. M. & G. 815; *Friary Breweries v. Singleton*, (1899) 1 Ch. 86; 68 L. J. 13 Ch.; 79 L. T. Rep. N. S. 465; 47 W. R. 93; affirmed on this point, (1899) 2 Ch. 261, C. A.; 81 L. T. Rep. N. S. 96; 68 L. J. 622, Ch.

(g) *Moore v. Choat*, 8 Sim. 508; *Moore v. Greg*, 2 Phil. 717.

(h) *Moore v. Greg*, 2 Phil. 717.

merely personal to the covenantor, usually termed "collateral" covenants.(a)

A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. When a covenant, which should be under seal, extends to a thing in *essee* parcel of the demise, the thing to be done by force of the covenant is annexed to the thing demised, and goes with the land and binds the assignee thereof, although he be not bound by express words.(b)

As to what covenants touch or concern the thing demised so as to run with the land, it may be stated, as a rule, that all implied covenants run with the land.(c) The following express covenants touch or concern the thing demised, and run with the land; to pay rent;(d) to pay taxes;(e) to repair and leave in repair;(f) to reside on the demised premises during the term;(g) to cultivate the land in a husband-like manner;(h) to repair, renew and replace tenant's fixtures and machinery fixed to the soil;(i) not to assign without the consent of the lessor, assigns being named;(k) to buy beer, &c., from the lessor;(l) and for quiet enjoyment.(m)

It was also decided in *Spencer's Case*(n) that if the covenant concerns a thing not in *esse* at the time of the demise, as to build a new wall on the premises, the assignee is not bound thereby, unless the lessee covenant for himself and his assigns.(o) But though he covenants for himself and his assigns, yet if the thing to be done be merely *collateral* to the land, and do not touch or concern the thing demised, the assignee is not liable thereon; as if the covenant were to build a wall upon land of the lessor which is no parcel of the demise.(p) So a covenant by a lessee to replace chattels which should become damaged does not bind the assignee; although we have seen it is otherwise as to fixtures.(q)

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 58, a covenant relating to land of inheritance, or devolving on the heir as special occupant, is, if made after the commencement of the Act, to be deemed to

(a) See *Spencer's Case*, 1 Sm. L. C. 65, 67, 9th edit.

(b) See *Spencer's Case*, 1 Sm. L. C. 65, 9th edit.; *Elliot v. Johnson*, L. R. 2 Q. B. 120.

(c) *Spencer's Case*, 1 Sm. L. C. 79, 9th edit; and as to implied covenants, see *ante*, pp. 312, 333.

(d) *Parker v. Webb*, 3 Salk. 5; Woodf. L. & T. 173, 16th edit.

(e) Woodf. *sup.* (f) *Martyn v. Clue*, 18 Q. B. 661; 22 L. J. 147, Q. B.

(g) *Tatem v. Chaplin*, 2 H. Bl. 133. (h) Woodf. L. & T. 173, 16th edit.

(i) *Williams v. Earl*, L. R. 3 Q. B. 739; 37 L. J. 231, Q. B. -----

(k) *Williams v. Earl*, *sup.*; *et ante*, p. 341. (l) *Ante*, p. 341.

(m) *Campbell v. Lewis*, 3 B. & A. 392; 1 Sm. L. C. 80, 9th edit.; Woodf. L. & T. 173, 16th edit.

(n) 1 Sm. L. C. 66, 9th edit.

(o) But see *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. 194, Ex., where it was held that the assignee was bound though not named.

(p) *Spencer's Case*, 1 Sm. L. C. 67, 9th edit.

(q) *Williams v. Earl*, *sup.*

be made with the covenantee, his heirs and assigns, and have effect as if heirs and assigns were expressed. And a covenant relating to land not of inheritance, or not devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his executors, administrators and assigns, and have effect as if they were expressed.

Notwithstanding an assignment by the lessee of his lease, he still continues liable on his express covenants during the term, although the lessor may have accepted the assignee.(a) But the assignee usually covenants to indemnify the assignor; and in the absence of such express covenant the original lessee has a legal right to be indemnified by the holder of the lease for the time being against breaches of covenant committed during the latter's tenancy.(b)

By the Conveyancing Act, 1881, s. 7, where a person for value conveys leaseholds, and is expressed to convey as beneficial owner, the following covenants are implied: That the lease is in full force; that all the rents reserved by, and all the covenants, &c., contained in, the lease on the lessee's part have been paid, observed, and performed up to the time of the conveyance; and that, notwithstanding anything to the contrary. &c., he has power to assign; for quiet enjoyment by the assignee during the remainder of the term, without interruption by the assignor, or any one rightfully claiming under him, and that freed from incumbrances by him, &c.. and for further assurance.(c) It will be noticed that by this Act no covenant is implied that the assignee will pay the rent and perform the covenants in the lease, and indemnify the assignor therefrom. If an express covenant is desired by the assignor, it must be inserted in the deed of assignment, and the deed be executed by the purchaser.(d)

The assignee is only liable for breaches of those covenants which run with the land and happen while he is assignee, and not for such as occur after he has assigned the term.(e) He is not, therefore, like the original lessee, entitled to a covenant from assignee for the payment of rent and observance of the covenants in the lease unless he himself is under the obligation of a like covenant of indemnity.(f) On the sale of leaseholds by a trustee in bankruptcy, the purchaser cannot be required to enter into a covenant of indemnity, such a covenant being unnecessary, as the liability of the trustee ceases on assignment.(g)

The personal representatives of the lessee are also liable as such to the extent of the assets.(h) And if an executor actually takes possession of the demised property, but not otherwise, he is personally liable for

(a) Sm. L. C. 84, 9th edit.; Woodf. L. & T. 272, 16th edit.

(b) *Moule v. Garrett*, L. R. 7 Ex. 101; 41 L. J. 62, Ex.; 26 L. T. Rep. N. S. 367; 20 W. R. 416.

(c) See also *ante*, p. 142.

(d) See Wolst. & T. Conv. 31, 5th edit.

(e) 1 Sm. L. C. 85, 9th edit.; Woodf. L. & T. 272, 16th edit.

(f) 1 Prid. Conv. 236, 14th edit; 233, 17th edit.

(g) *Wilkins v. Fry*, 1 Mer. 265; see also *Levi v. Ayres*, 3 App. Cas. 842; 47 L. J. 83, P. C.; 27 W. R. 79.

(h) Will. Exors. 1757, 8th edit.

subsequent rent up to the letting value of the premises ;(a) and also liable upon the covenant to repair.(b)

And an executor or administrator may still continue liable after he has assigned the premises ;(c) however, the Statute 22 & 23 Vict. c. 35 now protects an executor or administrator, liable as such to the rent and covenants in the lease, or agreement for a lease, granted or assigned to his testator or intestate, from further liability, if he has satisfied all claims in respect thereof due and claimed up to the time when he assigns it over to a purchaser, and he has also set apart a sufficient fund to answer any future claim that may be made in respect of any fixed sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the time for laying it out has not then arrived, and has distributed the residuary estate ; but the lessor may follow the assets of the deceased into the hands of the persons amongst whom distributed (sect. 27).

It has been held that an executor is not bound to insure, or continue the insurance of his testator's property against loss by fire.(d) By 56 & 57 Vict. c. 53, ss. 18, 50, a trustee or personal representative *may* insure against loss by fire insurable property to an amount not exceeding three equal fourth parts of the value of such property, &c.

Under Lease.—It must be remembered that if, instead of an assignment, the lessee grants an underlease of the demised premises, the underlessee is tenant to the lessee, and not to the original lessor ; between the original lessor and the underlessee no privity exists, consequently the original lessor cannot directly maintain an action against him for breaches of covenant contained in the original lease.(e) However, an underlessee may, by force of 44 & 45 Vict. c. 41, s. 14, and 55 & 56 Vict. c. 13, s. 4, obtain relief against a forfeiture of the lease under the circumstances, and to the effect stated *ante*, p. 347.

Assignment of the Reversion.—A lessor may by deed assign his reversion expectant on the lease, and at common law such an assignment would have given the assignee the right to the rent, but not to sue for breaches of express covenants entered into by the lessee with the lessor ; for at common law grantees of the reversion were regarded in the light of strangers and necessarily exempt from the liabilities of the lessor's covenants, and at the same time deprived of all the immediate benefits which the original

(a) *Re Bowss; Strathmore v. Vane*, 37 Ch. Div. 128 ; 58 L. T. Rep. N. S. 309 ; 57 L. J. 455, Ch. ; 36 W. R. 393 ; *Rendall v. Andrea*, 61 L. J. 630, Q. B.

(b) *Rendall v. Andrea*, *sup.*

(c) See *Will. Exors*, *sup.* ; 2 Sm. Comp. 804, 4th edit. ; Woodf. L. & T. 306, 16th edit.

(d) *Bailey v. Gould*, 4 Y. & Col. 221 ; 9 L. J. 43, Ex. ; *Fry v. Fry*, 27 Beav. 146 ; 28 L. J. 593, Ch.

(e) *Will. R. P.* 463, 16th edit. ; *Hall v. Ewin*, 37 Ch. Div. 74 ; 57 L. J. 95, Ch. ; 57 L. T. Rep. N. S. 831 ; *Bonner v. Tottenham, &c., Building Society*, (1899) 1 Q. B. 161 ; 68 L. J. 114, Q. B. ; 79 L. T. Rep. N. S. 611, C. A. ; and see *David v. Sabin*, (1893) 1 Ch. 523 ; 62 L. J. 347, Ch. ; *Bryant v. Hancock*, (1898) 1 Q. B. 716 ; 67 L. J. 507, Q. B. ; 78 L. T. Rep. N. S. 397 ; (1899) A. C. 442.

grantors themselves enjoyed in respect of the lease, except as above mentioned.(a) This was remedied by the 32 Hen. 8, c. 34, which placed the assignee of a reversion in the same position as to entry and suing (sect. 1), and being sued in respect of covenants running with the land in a lease by deed as the original lessor (sect. 2). And by the 4 Anne, c. 16, s. 9, attornment by a tenant to a new landlord is dispensed with, as fully shown *ante*, p. 304.

Further remedies have been provided by the 44 & 45 Vict. c. 41, s. 10, enacting that rent reserved by a lease (made after the commencement of the Act), and the benefit of every covenant or provision therein, having reference to the subject-matter thereof, to be observed or performed by the lessee, and every condition of re-entry and other condition therein, is to be annexed and incident to, and to go with the reversion, or any part of it, immediately expectant on the term granted by the lease, notwithstanding severance of such reversion, and is to be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part of the land leased.

This section apparently gives "the person entitled to the income," that is the beneficial owner, as well as the legal reversioner, the right to sue.(b)

And sect. 11 enacts that, as to leases made after the commencement of the Act, the obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease, shall, as far as he has power to bind the reversionary estate immediately expectant on the term granted, be annexed and incident to, and go with that reversionary estate, or the several parts thereof, notwithstanding severance thereof, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and so far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

It therefore makes legally binding, on the successors in title of a person who grants a lease under a power, all covenants which as against the remainderman the grantor had power to enter into.(c)

But a covenant in a lease by a lessor may be so qualified and controlled by a subsequent declaration therein, as to prevent such covenant running with the reversion.(d)

It was also a rule of the common law that a grantee of part of the reversion could not take advantage of a condition, as if a lease had been of three acres, reserving a rent upon condition, and the reversion of two

(a) Platt, Covts. 527, *et seq.*; Woodf. L. & T. 252, 13th edit.

(b) 1 Sm. L. C. 78, 9th edit.; Wolst. & B. Conv. 50, 8th edit.; and see *Municipal Building Society v. Smith*, 22 Q. B. Div. 70, stated *ante*, p. 197.

(c) Wolst. & B. Conv. Acts, 51, 8th edit.

(d) *Eccles v. Mills*, 67 L. J. 25, P. C.; 78 L. T. Rep. N. S. 206; 46 W. R. 398; (1898) A. C. 360.

acres were granted, the rent might be apportioned, but the condition was destroyed, as that was entire, and against common right.(a)

By 22 & 23 Vict. c. 35, s. 3, it is, however, provided that where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent, &c., as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent, &c., allotted or belonging to him.

The 44 & 45 Vict. c. 45, s. 12, further provides that, notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land leased, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land leased, every condition or right of re-entry and other condition in the lease, is to be apportioned and remain annexed to the several parts of the reversionary estate as severed, and to be in force with respect to the term whereon each severed part is reversionary, or the term which has not been surrendered, or avoided, or ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease (sub-sect. 1).

This section only applies to leases made after the commencement of this Act (after 31st Dec., 1881) (sub-sect. 2).

As already stated (*ante*, p. 145), s. 58 of the Conveyancing Act, 1881, renders it unnecessary to mention "heirs and assigns," or "executors, administrators and assigns" of the covenantee for the purpose of making the benefit of a covenant run with the land, but it does not, it is said, make a covenant so run where it would not do so if "heirs and assigns," or "executors, administrators and assigns" were expressed. And in the case of a lease sect. 10 of the Act annexes to the reversion the *benefit* of all the *lessee's* covenants, and so gives the benefit to *assigns*, though not mentioned; and sect. 11 annexes the *obligation* of the *lessor's* covenant to the reversionary estate, and binds assigns though not mentioned where the lessor had power to bind that estate. But in other cases the obligation of a covenant relating to land is carried no further than before the Act, and to bind the "assigns" they must still be mentioned where this was necessary before the Act.(b)

As to an assignment of a lease by way of mortgage see *ante*, pp. 212, 341.

Surrender of a Lease.

A lease may be determined by surrender, which may be express, or by operation of law.

(a) Will. Real Pro. 401, 13th edit.

(b) Wolst. & B. Conv. Acts, 116, 8th edit.; 1 Sm. L. C. 78, 9th edit.; *et ante*, p. 355.

Express.—As already seen(*a*) the Statute of Frauds requires the surrender of a lease of any tenements, not being copyhold, to be by deed or writing, or by act and operation of law (sect. 3); and the 8 & 9 Vict. c. 106, requires such surrender, not being an interest which might have been created without writing,(*b*) to be by deed (sect. 3).

In order that the surrender may operate it must be made to him who, at the time thereof, has the next immediate estate in remainder or reversion in his own right. The operative words usually used are "surrender and yield up;" but no particular words are essential.(*c*)

One joint tenant cannot, strictly speaking, *surrender* to another joint tenant, but he may release to him.(*d*)

By Operation of Law.—A surrender by act and operation of law arises (1) where the lessee quits and gives up, and the lessor by some unequivocal act resumes possession of the premises in pursuance of an agreement between them that the lease shall come to an end;(*e*) or (2) where a lessee accepts a new lease commencing during the continuance of the first lease; for the tenant by accepting the new lease is estopped from saying that his lessor had no power to grant it; and as the lessor could not grant the new lease until the prior one was surrendered, the acceptance of the new lease operates as a surrender in law of the old one.(*f*) But if the new lease is void there will be no surrender by operation of law.(*g*) And (3) where the new lease is made to a third person with the assent of the original tenant who *gives up* his possession, it is a surrender by operation of law.(*h*)

As to the effect on an underlease of a surrender of a lease, in order to be renewed, see *ante*, p. 344.

Merger of a Lease.

It will be gathered from the previous remarks on surrender that a lease for years may be determined by merger. For where the term and the reversion become vested in the same person in the same right, without any intermediate estate, the term is drowned or merged in the reversion. But there will be no merger if the term is taken in the right of another, as if the tenant for years dies, having appointed the reversioner his executor.(*i*) A term of years will merge in the immediate reversion, though that be a chattel interest of shorter duration than the term on which it is expectant;

(*a*) *Ante*, p. 354.

(*b*) See *ante*, p. 278.

(*c*) Woodf. L. & T. 313, 315, 16th edit.

(*d*) Woodf. L. & T. 307, 13th edit.; Will. R. P. 187, 13th edit.

(*e*) *Phené v. Popplewell*, 12 C. B. N. S. 334; 31 L. J. 235, C. P.; 6 L. T. Rep. N. S. 247; *Re Panther Lead Company*, (1896) 1 Ch. 978; 65 L. J. 499, Ch.; 44 W. R. 573.

(*f*) *Davison d. Bromley v. Stanley*, 4 Burr. 2210; *McDonnell v. Pope*, 9 Hare 705; *Lyon v. Reed*, 13 M. & W. 285; 13 L. J. 377, Ex.

(*g*) *Davison d. Bromley v. Stanley*, *sup.*; Woodf. L. & T. 316, 16th edit.

(*h*) *Davison v. Gent*, 1 H. & N. 744; 26 L. J. 122, Ex.; *Wallis v. Hands*, (1893) 2 Ch. 75; 62 L. J. 586, Ch.; 68 L. T. Rep. N. S. 428; 41 W. R. 471.

(*i*) 2 Bl. Com. 177.

for merger is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity* of interest.(a)

By the Jud. Act, 1873, s. 25 (4), there is no longer to be any merger by operation of law only of any estate, the beneficial interest of which would not be deemed to be merged or extinguished in equity.

A tenant for years purchasing the reversion in fee may prevent a merger by taking the conveyances thereof to a trustee for himself, expressly to prevent a merger.(b)

Disclaimer of a Lease by a Trustee in Bankruptcy.

The bankrupt's leaseholds vest under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) in the trustee in bankruptcy on his appointment (*ante*, p. 34); and subject to his right of disclaimer, he becomes personally liable for the rent accruing due after his appointment; and he is also liable for any breach of the covenants of the lease since his appointment, or at least on such of them as run with the land; but he has a right to be indemnified out of the assets.(c) And he may assign the lease, even to a pauper, though there be a covenant not to assign without license.(d) And by the Bankruptcy Act, 1883, s. 55, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), sect. 13, as already stated (*ante*, pp. 67, 231), the trustee, although he has taken possession, may by writing, signed by him within twelve months after his appointment, disclaim the bankrupt's onerous property; and if the property has not come to his knowledge within one month after his appointment, he may disclaim it within twelve months after he first became aware thereof, which disclaimer operates to determine as from its date, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and also discharges the trustee from all personal liability in respect thereof, as from the date when the property vested in him; but is not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, to affect the rights or liabilities of any other person. The trustee may by Bk. R. 320, disclaim a lease without the leave of the court, when the bankrupt has not sub-let the demised premises or any part thereof, or created any mortgage or charge thereon, and the rent reserved and real value of the property are less than 20*l.* per annum; or when the estate is small and administered in a summary way under sect. 121 of the Act; or where the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not, within due time after its receipt, give notice to the trustee requiring the matter to be brought before the court.(e)

(a) 1 St. C. 310, 12th edit.; Burt. Comp. pl. 899.

(b) *Belany v. Belany*, 2 Ch. App. 138; 36 L. J. 265, Ch.; 16 L. T. Rep. N. S. 269; 15 W. R. 369.

(c) Bald. Bk. 187, 7th edit. and note.; Will. Bk. 258, 7th edit.

(d) *Doe v. Beavan*, 3 M. & S. 353; *Hopkinson v. Lovering*, 11 Q. B. Div. 92.

(e) Bk. R. r. 320 (1890); *et ante*, p. 231.

And by 46 & 47 Vict. c. 52, s. 55 (4), the trustee is not entitled to disclaim where any person interested in the property has requested him in writing to decide whether he will disclaim or not, and he, for a period of twenty-eight days thereafter, or such extended period as the court may allow, has declined or neglected to give notice, whether he disclaims or not.

By sub-sect. 6, the court may on application by any person claiming an interest, &c., in any disclaimed property, make an order vesting it in any such person or in any trustee for him, upon such terms as the court thinks just; but in the case of leasehold property the order is not to be made in favour of any underlessee or mortgagee by demise claiming under the bankrupt except upon the terms of making him subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date when the bankruptcy petition was filed. But by 53 & 54 Vict. c. 71, s. 13, these terms may be modified by the court if it thinks fit.

Notice to quit.

As already stated, a lease for a term certain determines at the expiration of such term without any notice to quit being necessary.(a)

Length of Notice.—A tenancy from year to year continues until it is put an end to by half a year's notice to quit from one of the parties, and such notice must expire at the anniversary of the commencement of the tenancy, unless there be an express stipulation to the contrary. The notice may be given so as to expire at the end of the first or any subsequent year of the tenancy.(b) The right to determine a tenancy from year to year by notice to quit is a necessary incident to such a tenancy, and a stipulation to the contrary is void.(c) Under the Agricultural Holdings Act, 1883, however, a year's notice instead of a half year's notice must be given, unless the parties agree in writing to exclude the Act.(d) And the parties to an ordinary tenancy may expressly stipulate for a longer or a shorter notice to quit than that usually required by law; or for a notice expiring at some other period of the tenancy than at the end of the first or some other year.(e) But the stipulation must be explicit, thus on a letting from year to year "to quit at a quarter's notice," the notice must expire at the end of the anniversary of the letting, and not at any other part of the year.(f)

In the case of a monthly tenancy it seems that a month's notice to quit should be given and is sufficient.(g) And it seems a week's notice is

(a) *Ante*, p. 280.

(b) *Ante*, p. 279.

(c) *Doe v. Browne*, 8 East 165.

(d) 46 & 47 Vict. c. 61, s. 33; *Barlow v. Teal*, 15 Q. B. Div. 403, 501; 54 L. J. 564, Q. B.; 34 W. R. 54.

(e) *Kemp v. Derrett*, 3 Camp. 510; *Re Threlfall*, 16 Ch. Div. 274; 44 L. T. Rep. N. S. 74; *King v. Eversfield*, (1897) 2 Q. B. 475; 77 L. T. Rep. N. S. 195; 66 L. J. 809, Q. B.

(f) *Doe v. Donovan*, 1 Taunt. 555; Woodf. L. & T. 333, 13th edit.

(g) See Woodf. L. & T. 358, 16th edit.

necessary and sufficient to determine a weekly tenancy.(a) As to the notice required to determine a tenancy at will or at sufferance, see *ante*, p. 280.

An insufficient notice to quit will not determine a tenancy unless assented to by the landlord under such circumstances as would amount to a surrender of the tenancy by operation of law.(b)

Form of notice.—A notice to quit must be clear and certain, so as to bind the party who gives it and to enable the party to whom it is given to act upon it.(c)

A parol notice to quit under a parol lease is sufficient,(d) though given by the steward of a corporation.(e) But a notice to quit is usually given in writing, as this facilitates proof. Although the notice be imperfectly expressed, it is a good and valid notice if accepted as such at the time by the landlord.(f) And a notice to quit on the anniversary of the day “at” or “on” or “from” which the tenancy commenced is good.(g)

The notice must not be equivocal, therefore where it ran “kindly take notice that I intend to *surrender* to you the tenancy of this house on or before the 29th September, 1888,” it was held equivocal and bad.(h) But where the notice ran “I desire you to quit or I shall insist on double rent,” the notice was held sufficiently certain.(i)

The notice must extend to *all* the demised premises, and not to a *part* only, or it will be bad,(k) save under the Agricultural Holdings Act, 1883,(l) when given with a view to the use of the land for the erection of labourers’ cottages, &c.

A mere misdescription of the property in the notice is not fatal, if the tenant be not misled by it; as where the property was stated in the notice to be “The Waterman’s Arms” instead of the “Bricklayer’s Arms,” though otherwise sufficiently designated.(m) So where the premises were stated to be in the parish of D. instead of the parish of H., the notice was held sufficient, as it did not appear that the tenant was misled.(n)

The notice must require the tenant to quit at the proper time,(o) therefore a notice to quit at noon on the day of the expiry of the notice is bad, as the tenant is entitled to retain possession till midnight of that day.(p)

(a) *Bowen v. Anderson*, (1894) 1 Q. B. 164; 42 W. R. 236.

(b) *Doe v. Johnstone*, 1 M’Cl. & Y. 141; *Johnstone v. Huddleston*, 4 B. & C. 922.

(c) Woodf. L. & T. 345, 13th edit.; 371, 16th edit.

(d) *Timmings v. Rawlinson*, 3 Bur. 1603; *Doe v. Crick*, 5 Esp. 196.

(e) *Roe v. Pierce*, 2 Camp. 96.

(f) *General Assurance Company v. Worsley*, 64 L. J. 253, Q. B.; 72 L. T. Rep. N. S. 358.

(g) *Sidebotham v. Holland*, (1895) 1 Q. B. 378; 64 L. J. 200, Q. B.; 72 L. T. Rep. N. S. 62; 43 W. R. 228.

(h) *Gardner v. Ingram*, 61 L. T. Rep. N. S. 729.

(i) *Doe v. Jackson*, 1 Dough. 175.

(k) *Doe v. Archer*, 14 East, 245.

(l) 46 & 47 Vict. c. 61, s. 41.

(m) *Doe d. Cox*, 4 Esp. 185.

(n) *Doe v. Wilkinson*, 12 A. & E. 743.

(o) See *ante*, p. 362.

(p) *Page v. More*, 15 Q. B. 684; *Sidebotham v. Holland*, *sup.*

Where it is unknown at what time of the year the tenancy commenced, the notice should be to quit on a specified quarter day, adding "or at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice.(a)

By whom and to whom given.—A notice to quit may be given either by the landlord or the tenant, or by the authorised agent of either party.(b) A notice to quit given by a general agent in his own name is valid.(c) But if the agent has only a limited authority, the notice should be given in the name of the principal, or expressly on his behalf.(d)

Any person, for the time being, legally entitled to the immediate reversion of and in the demised premises, *ex. gr.*, as assignee, devisee, heir, executor, or administrator of the landlord, may give notice to quit.(e) A mortgagee whose mortgage is subsequent to the commencement of a tenancy from year to year is an assignee of the reversion.(f)

A notice to quit signed by one of several joint tenants on behalf of himself and the others, is sufficient to determine a yearly tenancy.(g)

Where the notice is given by the landlord, it should be given to his immediate tenant, or his assignee, &c., in whom the term is then vested, and not to a mere sub-tenant.(h) The notice should be directed to the tenant, but it may be delivered to his solicitor or agent.(i)

So where the notice is given by the tenant it should be given to his immediate landlord or his assignee, or person legally entitled to the immediate reversion, *ex. gr.*, the heir, devisee, or executor or administrator of such landlord, as the case may require.(k) So the notice may be given to the attorney or agent duly authorised in that behalf of such landlord;(l) but a notice to quit given to a mere collector of rents is not good.(m)

Service of Notice.—The notice may be served on any day including Sunday.(n) It need not be served personally on the tenant; it may be left at his dwelling-house with his wife,(o) or his servant, who

(a) *Doe v. Steel*, 3 Camp. 115; *Wride v. Dyer*, 81 L. T. Rep. N. S. 453; (1900) 1 Q. B. 23; 69 L. J. 17, Q. B.

(b) Woodf. L. & T. 342, 13th edit.

(c) *Jones v. Phipps*, L. R. 3 Q. B. 567; 87 L. J. 173, Q. B.; 18 L. T. Rep. N. S. 655; 16 W. R. 1018.

(d) *Doe v. Goldwin*, 2 Q. B. 143, 146; *Jones v. Phipps*, sup.

(e) Woodf. L. & T. 342, 13th edit.; 368, 16th edit.

(f) See *ante*, p. 196.

(g) *Doe v. Summersett*, 1 B. & Ad. 135.

(h) *Pleasant d. Hayton v. Bensen*, 14 East, 234; *Roe v. Wiggs*, 2 Bos. & P., N. R. 330.

(i) *Doe v. Ongley*, 10 C. B. 25.

(k) Woodf. L. & T. 345, 13th edit.; 370, 16th edit.

(l) *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J. 265, Ex.; 2 L. T. Rep. N. S. 326; *General Assurance Company v. Worsley*, 64 L. J. 253, Q. B..

(m) *Pearse v. Boulter*, 2 F. & F. 133.

(n) *Sangster v. Noy*, 16 L. T. Rep. N. S. 157.

(o) *Smith v. Clark*, 9 Dowl. 202.

promises to give it to the tenant.(a) The notice may, it seems, be sent through the post.(b)

Withdrawal or Waiver of Notice.—A notice to quit, whether given by landlord or tenant, can only be withdrawn by the consent of both parties; for a valid notice to quit determines the tenancy on the expiration of the notice. Therefore a withdrawal or a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one.(c) If the landlord receives rent due after the *expiration* of the notice, it is a waiver of the notice;(d) so if he distrains for such rent.(e)

Tenant holding over.—By 4 Geo. 2, c. 28, s. 1, any tenant for life or years who *wilfully* holds over and retains possession of the demised premises after the determination of his term, and after possession has been demanded and *written* notice for delivery thereof given him by the lessor, is liable to pay double the *yearly value* of the land, &c., so detained, to be recovered by action.

The Act only applies where the holding over is wilful and contumacious, and not where the tenant holds over under a fair and reasonable claim of title.(f) The Act does not extend to a weekly tenant; for he is not a tenant for life or years.(g)

By 11 Geo. 2, c. 19, if any tenant gives notice to the lessor of his intention to quit at a particular time, and does not give up possession at the time mentioned, such tenant, his executors, or administrators, shall thenceforward pay to the landlord double *the rent*, which he would otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner as the single rent (sect. 18). The double rent may, therefore, be recovered either by distress or action.(h)

The tenant's notice to quit need not be in writing, under the last-named Statute.(i)

Fixtures.

As between landlord and tenant fixtures may be divided into (1) tenant's fixtures, and (2) landlord's fixtures; the former applying to such personal chattels as have been annexed to the freehold by the tenant during his term, either for mere ornament or convenience, or for the purposes of trade, and which he has a right to sever and remove during the term in the absence of any express stipulation, or local custom to the contrary. While landlord's fixtures are those put up by

(a) *Liddy v. Kennedy*, L. R. 5 H. L. Cas. 134; *Tanham v. Nicholson*, Id., 561.

(b) *Papillon v. Brunton*, sup.

(c) *Tayleur v. Wildin*, L. R. 3 Ex. 303; 37 L. J. 173 Ex.; 18 L. T. Rep. N. S. 655; 16 W. R. 1018.

(d) *Goodright v. Cordwent*, 5 T. R. 219; *Keith v. National Telephone Co.*, (1894) Ch. 147; 63 L. J. 373, Ch.; 70 L. T. Rep. N. S. 276; 42 W. R. 380.

(e) *Zouch v. Willingdale*, 1 H. Bl. 311.

(f) *Swinfen v. Bacon*, 6 H. & N. 184, 846; 30 L. J. 33, 368, Ex.

(g) *Lloyd v. Rosbee*, 2 Camp. 453.

(h) *Woodf. L. & T.* 749, 13th edit.

(i) *Timmins v. Rowlinson*, 3 Burr. 1608.

the landlord before or during the term, or by the tenant during the term, which he has no right to remove.(a) Amongst landlord's fixtures are included chimney-pieces, grates, locks and keys, also mill stones, steam engines, &c.(b)

The general rule as to fixtures is that whatever is fixed to the freehold becomes part of it, the maxim being *Quicquid solo plantatur, solo cedit*.(c) To this rule there are several exceptions: (1) where the annexation is made by a tenant for the mere purpose of ornament or convenience during the term; (2) where it is made for the purpose of trade; or (3) is an exception made by statute for agricultural purposes.

For Ornament or Convenience.—Amongst fixtures of this nature which are severable and removable by the tenant, are tapestry, pier glasses nailed or screwed to the walls,(d) marble or other *ornamental* chimney pieces, but not a chimney piece which is not ornamental.(e) And wainscot put up by the tenant may be removed by him;(f) or a pump, if so fixed as to be removable without injury to the freehold, as being an article of convenience.(g) But fixtures for ornament or convenience, which may be deemed permanent improvements, and cannot be detached without material injury to the freehold, cannot be removed by the tenant; as a greenhouse built in a garden and constructed of wooden frames fixed with mortar to foundation walls of brickwork.(h)

For Trade.—For the encouragement of trade a tenant may remove fixtures which he has put up for such purpose. Thus, a soap boiler who for the purposes of his trade puts up vats, coppers, and tables, may remove them during his term.(i) So a fire engine set up by the tenant for the purpose of working a colliery was held removable.(k) But buildings built of brick with brick foundations let into the soil, although erected for the purposes of trade, cannot be removed by the tenant.(l)

Time and Mode of Removal.—Whether the annexation or erection is for the purposes of ornament or convenience, or for the purposes of trade, the removal must in the absence of contract, be made prior to the determination of the tenancy;(m) and this rule applies whether the lease

(a) Woodf. L. & T. 662, 16th edit.; Amos and F. Fix. 1, 2, 47, 3rd edit.

(b) Amos and F. Fix. 1, 20, 152, 3rd edit.

(c) Woodf. L. & T. 665, 16th edit.; Amos and F. Fix. 9, 28, 3rd edit.

(d) Woodf. L. & T. 670, 16th edit.; Amos and F. Fix. 105, 3rd edit.; *Beck v. Rebow*, 1 P. Wm. 94.

(e) *Leach v. Thomas*, 7 C. & P. 328; *Bishop v. Elliott*, 11 Ex. 113; 24 L. J. 229, Ex.; and see Amos and F. Fix. 109, 120, 121, 3rd edit.

(f) *Ex parte Quincey*, 1 Atk. 477.

(g) *Grymes v. Boweren*, 6 Bing. 437.

(h) *Jenkins v. Gething*, 2 John. & H. 520.

(i) *Poole's Case*, 1 Salk. 368; 2 Sm. L. C. 207, 9th edit.; Amos & F. Fix. 44, 49, 3rd edit.

(k) *Lawton v. Lawton*, 3 Atk. 16; *Dudley v. Ward*, Ambl. 118.

(l) *Whitehead v. Bennett*, 27 L. J. 474, Ch.

(m) *Weeton v. Woodcock*, 7 M. & W. 14; *Barff v. Probyn*, 64 L. J. 557, Q. B.; 73 L. T. Rep. N. S. 118; Amos & F. Fix. 127, *et seq.*, 3rd edit.

determines by effluxion of time, or by a re-entry on forfeiture.(a) By special agreement, however, between landlord and tenant, the removal may as between them be permitted after the above named period.(b) But where a landlord agreed verbally with his tenant to allow the tenant to remove tenant's fixtures after the expiration of the tenancy, and then refused to allow such removal, it was held that though this may give the tenant a right of action against his landlord for the value of the fixtures, it would not give such a right of action against the landlord's mortgagees who were such before the agreement, and were no parties thereto.(c)

However, under the Agricultural Holdings Act, 1883, the removal may be made after the termination of the tenancy, as stated *infra*.

And as before stated, the removal must also be made by the tenant without doing any material injury to the freehold.(d)

Agricultural fixtures.—It was originally held that the privilege established in favour of tenants in trade did not extend to agricultural tenants, so as to entitle them to remove things which they had erected for the purposes of husbandry.(e) However, by 14 & 15 Vict. c. 25, s. 3, if a tenant of a farm or lands, with the written consent of his landlord, at his own cost, erects any farm building or puts up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (not in pursuance of some obligation in that behalf), all such buildings, &c., are to be the property of the tenant and removable by him, notwithstanding they consist of separate buildings, or may be built in or permanently affixed to the soil; so that the removal is made without injury to the land or buildings of the landlord, or otherwise put the same in as good plight and condition as the same were in before the erection of the things so removed. Before removal the tenant must give to the landlord, or his agent, a month's written notice of his intention, and the landlord may elect to purchase the things proposed to be removed, whereupon the right of removal ceases. The value is to be ascertained by two referees, one chosen by each party, or their umpire.

And by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), which applies only to holdings wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or in whole or in part cultivated as a market garden (sect. 54). It is further provided by sect. 34, that where, after the operation of the Act, a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under the Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation

(a) *Pugh v. Arton*, L. R. 8 Eq. 626; 38 L. J. 619, Ch.; 20 L. T. Rep. N. S. 865; *Amos & F. sup.* 386.

(b) 2 Sm. L. C. 217, 9th edit.; *Amos & F. Fix.* 162, 3rd edit.

(c) *Thomas v. Jennings*, 66 L. J. 5, Q. B.; 75 L. T. Rep. N. S. 274; 45 W. R. 93.

(d) *Avery v. Cheslyn*, 3 A. & E. 75; *Leach v. Thomas*, 7 C. & P. 327; *Amos & F. Fix.* 70, 123, 126, 3rd edit.

(e) *Elwes v. Maw*, 2 Sm. L. C. 182, 9th edit.; *Amos & F. Fix.* 73, 3rd edit.

in that behalf, or instead of some fixture or building belonging to the landlord, then the fixture or building is to be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. But (1) before the removal the tenant must satisfy all his obligations to the landlord in respect of the holding; (2) and in the removal he must not do any avoidable damage to any other part of the holding; and (3) immediately after the removal must make good all damage occasioned to any other part of the holding by the removal; and (4) must not remove such fixture or building without giving a month's previous written notice to the landlord of his intention to remove it; when the landlord, before the expiration of the notice, by written notice to the tenant, may elect to purchase the same, whereupon the right of removal ceases and the fixture or building becomes the property of the landlord, who must pay the tenant the fair value thereof (sect 34). This section is after 1900 to apply to a fixture or building acquired by a tenant otherwise than by erection, &c. (63 & 64 Vict. c. 50, ss. 4, 13.)

Further, by the Market Gardeners' Compensation Act, 1895,^(a) (operating from 1st January, 1896), where it is agreed in writing that a holding shall be let or treated as a market garden, the provisions of s. 34 of 46 & 47 Vict. c. 61 (*supra*), shall extend to every fixture or building affixed or erected by the tenant to or upon such holding for the purposes of his trade or business of a market gardener (sect. 3).

Emblements.

Emblements consist of the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator. Fruit trees, therefore, are not included in the term. Where there is a right to emblements, ingress, egress, and regress are allowed by law to enable the party to enter to cut and carry them away after the estate is determined. This does not, however, give a title to the exclusive occupation of the land. Where a tenant has an uncertain estate or interest in land, which is determined by the act of God, or the law between the period of sowing and the severance of the crop, he is entitled to emblements.^(b)

It has, however, already^(c) been shown that by 14 & 15 Vict. c. 25, a tenant of a farm or lands held at rack rent, whose interest is determined by the death or cesser of the estate of a landlord entitled for life or other uncertain interest, is, instead of claims to emblements, to occupy such farm or lands until the expiration of the current year of his tenancy, and then to quit without notice, paying a fair proportion of rent up to the time of quitting to the succeeding landlord (sect. 1).

(a) 58 & 59 Vict. c. 27.

(b) Co. Lit. 55 b., 56 a.; Woodf. L. & T. 749, 750, 13th edit.; Well. Exors. 715, 8th edit.

(c) *Ante*, p. 284.

The representatives of a tenant for life are entitled to emblements, but not if he determines his estate by his own act, as by forfeiture; however, had he leased the estates, his tenant was nevertheless entitled to emblements.(a) And it must be remembered that the statute 14 & 15 Vict. c. 25, only applies to tenants at rack rent.

A tenant who holds for a term certain is not, in the absence of custom, entitled to emblements, for it is his own fault, if under such a tenancy he sows the crops.(b)

A tenant at will is entitled to emblements where his estate is determined by the act of his landlord, but not where the tenant himself determines the tenancy.(c)

The Agricultural Holdings Acts.

As already stated, at common law a tenant who knows when his tenancy will end has no rights on or out of the land at the end of his tenancy.(d) But the custom of a particular place may modify this rule. And a custom that a tenant, whether by parol or by deed, shall have the way-going crop after the expiration of his term, is good, if not repugnant to the lease by which he holds.(e)

Other customs existed, as for tillage;(f) and although the Agricultural Holdings Act, 1883, as amended by the Agricultural Holdings Act, 1900, makes provision for certain specified improvements, &c., in the land, yet the Act of 1883, by sect. 60, expressly enacts that, except as in the Act expressed, nothing in the Act is to prejudicially affect any power, right, or remedy of a landlord or tenant vested in or exercisable by him under any custom of the country, or otherwise, in respect of any contract, or of any improvements, waste, emblements, tillages, away going crops, fixtures, &c. (See also sect. 1, sub-s. 5 of the Act of 1900.) And, irrespective of these Acts, unless the outgoing and the incoming tenant agree for the payment by the latter to the former of the amount claimed by him for away going crops, &c., the landlord is bound by the custom of the country to pay the outgoing tenant what is due in respect thereof.(g) As already shown, however (*ante*, p. 338), the lease usually contains provisions thereon.

And now the relative rights of landlords and tenants of tenancies coming within its provisions (*ante*, p. 367) are considerably affected by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), as amended

(a) Woodf. L. & T. 752, 13th edit.

(b) *Wigglesworth v. Dallison*, 1 Sm. L. C. 577, 9th edit.

(c) Co. Lit. 55 b.; Woodf. L. & T. 752, 13th edit.

(d) *Wigglesworth v. Dallison*, sup.; Woodf. L. & T. 754, 13th edit.; *Caldecott v. Smythies*, 7 C. & P. 806.

(e) *Wigglesworth v. Dallison*, 1 Sm. L. C. 569, 577, 9th edit.; *Caldecott v. Smythies*, sup.

(f) *Dalby v. Hirst*, 1 B. & B. 347.

(g) *Bradburn v. Foley*, 3 C. P. Div. 129; 47 L. J. 331, C. P.; 38 L. T. Rep. N. S. 421; 26 W. R. 423.

by the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50). The latter Act comes into operation on 1st January, 1901 (sect. 13). By sect. 1, where a tenant has made an improvement comprised in sched. 1 to this Act, he is, subject to the Agricultural Holdings Act, 1883, and to this Act, to be entitled, at the determination of a tenancy, on quitting his holding to obtain from his landlord as compensation for the improvement such sum as fairly represents the value thereof to an incoming tenant. But what is due to the inherent capabilities of the soil is not to be taken into account (sect. 1, sub-sect. 1).

In ascertaining the amount of compensation payable to a tenant there is to be taken into account any benefit given or allowed by the landlord to the tenant for executing the improvement (sub-sect. 3), and in the case of compensation for manures there is to be taken into account the value of the manure required by contract or custom to be returned to the holding for crops sold off or removed from the holding within the last two years of the tenancy, &c., not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed (sub-sect. 4).

And by the Agricultural Holdings Act, 1883, as regards any improvement mentioned in sched. 1, pt. 1 of the Act, compensation is not to be payable for any improvement made after the commencement of the Act unless the landlord has, previous to its execution, *consented* thereto in writing, and such consent may be given unconditionally, or upon such terms as to compensation, or otherwise, as may be agreed upon between the parties, and in the event of an agreement, the compensation payable thereunder is to be substituted for compensation under the Act (sect. 3). By the Agricultural Holdings Act, 1900, sect. 1 (2), references in the Act of 1883 to sched. 1 to that Act are to be construed as references to sched. 1 to the Act of 1900.

The improvements specified in sched. 1, pt. 1, of the Act of 1900, are (1) erection or enlargement of buildings; (2) formation of silos; (3) laying down of permanent pasture; (4) making and planting of osier beds; (5) making of water meadows or works of irrigation; (6) making of gardens; (7) making or improving of roads or bridges; (8) making or improving of watercourses, ponds, wells, or reservoirs, or of works for the supply of water for agricultural or domestic purposes; (9) making or removal of permanent fences; (10) planting of hops; or (11) of orchards, or fruit bushes; (12) protecting young fruit trees; (13) reclaiming of waste land; (14) warping or weiring of land; (15) embankment and sluices against floods; (16) erection of wirework in hop gardens.

So in regard to any improvement mentioned in sched. 1, pt. 2, of the Act of 1900, viz., (17) drainage, compensation is not to be payable unless the tenant has, not more than three months and not less than two months before commencing the improvement, given written *notice* to the landlord of his intention to make it, and thereupon (1) the parties may agree on the terms of compensation or otherwise on which the improvement is to be executed, and any compensation payable thereunder is to be substituted for that under the Act; or (2) the landlord may undertake to execute the

improvement, and charge the tenant with a sum not exceeding 5 per cent. per annum on the outlay, or not exceeding such annual sum payable for a period of twenty-five years as will repay such outlay in that period with interest at 3 per cent. per annum, recoverable as rent. So the landlord and tenant may dispense with any notice, and come to an agreement in the lease or otherwise between themselves (46 & 47 Vict. c. 61, s. 4; 63 & 64 Vict. c. 50, s. 1 (2) and sch.).

It will be noticed that as to the improvements specified in pt. 1 of sched. 1 to the Act of 1900, the written consent of the landlord is requisite; and as to those specified in pt. 2, written notice to the landlord is required. But as to the improvements specified in pt. 3, the consent of or notice to the landlord is not required. (See sched. 1, Act of 1900; see also Act 1883, sects. 3, 4, and 5, par. 2.) These improvements are (18) chalking of land; (19) clay burning; (20) claying, &c., of land; (21) liming of land; (22) marling of land; (23) applying to land purchased manure; (24) consumption on the holding by cattle, &c., of corn-cake or feeding stuff not produced on the holding; (25) consumption on the holding by cattle, &c., of corn proved to have been produced and consumed on the holding; (26) laying down temporary pasture with clover or other seeds sown more than two years prior to the determination of the tenancy; (27) in the case of a holding to which sect. 3 of the Market Gardeners' Compensation Act, 1895 (*infra*), applies: (i.) planting of standard or other fruit trees permanently set out; or (ii.) of fruit bushes permanently set out; (iii.) planting of strawberry plants; or (iv.) of asparagus and other vegetable crops which continue productive for two or more years; (v.) erection or enlargement of buildings for the business of a market gardener.

By sect. 9 of the Act of 1900, references to manures in the Acts are to be construed as references to improvements numbered 23, 24, and 25, *supra*.

By sect. 2 of the Act of 1900, the landlord and tenant may agree as to the amount, mode, and time of payment of compensation for any improvement contained in sched. 1 to the Act, and if they do not the difference is to be settled by arbitration in accordance with any agreement between them thereon, and in default thereof by arbitration under this Act in accordance with the provisions set out in sched. 2 (sect. 2, sub-sect. 1), to which the reader is referred.

Any claim by a tenant for compensation under the Acts for any such improvement is not to be made after the determination of the tenancy, except as to an improvement executed after the determination of the tenancy and while the tenant lawfully remains in occupation of part of the holding, when it may be made before he quits that part (sub-sect. 2; see also sub-sects. 3 to 8.)

By sect. 7 the compensation for an improvement made before the Act comes into operation (1st January, 1901) is to be such as could have been claimed if this Act had not been passed, but it is to be ascertained in the manner provided by this Act.

By the Act of 1883, sects. 29, 30, as amended by the Act of 1900, sect. 3, provision is made on a landlord paying compensation, &c., for his

obtaining from the Board of Agriculture a charge on the holding in respect thereof, which is to be a land charge within the meaning of the Land Charges, &c., Act, 1888 (*ante*, p. 169), and may be registered accordingly.

An incoming tenant has on quitting a right to compensation for improvements purchased from the outgoing tenant (46 & 47 Vict. c. 61, s. 56; 58 & 59 Vict. c. 27, s. 3, sub-s. 4).

A tenant is not to be entitled to compensation for any improvements, other than manures, begun by him, if he holds from year to year, after he has given or received final notice to quit, &c., or if he holds on lease, during the last year thereof, save as in the section specified (sect. 59).

Any contract by the tenant depriving him of his right to compensation under the Act for improvements, except substituted compensation, is void (sect. 55).

It will be noticed (*ante*, p. 371) that sched. 1, part 3 (No. 27), provides for compensation for certain improvements to a holding to which sect. 3 of the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), applies. This Act came into operation 1st January, 1896 (sect. 2). In order that the Act may apply, there must after its commencement be a written agreement that a holding shall be let or treated as a market garden (sect. 3), subject, however, to the provisions of sect. 4.

The tenant may, by sect. 3, remove all fruit trees and fruit bushes planted by him on the holding and not permanently set out; but unless this is done before the termination of the tenancy they remain the property of the landlord, and the tenant is not entitled to any compensation in respect thereof (sub-sect. 5).

By sect. 4, the Act is, under certain conditions, to apply to tenancies of market gardens current at the commencement of the Act.

The foregoing advantages in favour of a market gardener should be carefully observed.

The 50 & 51 Vict. c. 26, provides for compensation to the occupiers of allotments and cottage gardens for crops left in the ground at the end of their tenancies. So 53 & 54 Vict. c. 57, provides for compensation due to tenants on land under mortgage, stated *ante*, p. 196.

Attendant Terms.

As already (*ante*, p. 120) stated, by 8 & 9 Vict. c. 112, all satisfied terms of years which were attendant on the inheritance on 31st December, 1845, were on that day to cease, &c.

Enlargement of terms of Years into a Fee Simple.

When there is a residue unexpired of not less than 200 years of a term which, as originally created, was for not less than 300 years, subsisting in land without any trust or right of redemption affecting the term in favour of the freeholder or other reversioner, and without any rent having money value, incident to the reversion, the term may be

enlarged into a fee simple by (1) any person beneficially entitled in right of the term to possession of any land comprised in the term ; (2) a trustee of the term ; (3) any personal representative in whom the term is vested ; to be effected by deed executed declaring to that effect. The fee will be subject to the same trusts, rights, equities and obligations as the term (44 & 45 Vict. c. 41, sect. 65).

By sect. 11 of 45 & 46 Vict. c. 39, every such term as above mentioned is to be included, whether having as the immediate reversion thereon the freehold or not ; but not (1) any term liable to be determined by re-entry for condition broken, or (2) any term created by subdemise out of a superior term itself incapable of being enlarged into a fee simple.

CHAPTER VIII.

COPYHOLDS.

COPYHOLD estates are estates held by copy of court roll, and, in construction of law, at the will of the Lord of the Manor of which they form part, according to the custom of the manor. It follows, that in dealing with such estates the custom of the manor must be followed.(a)

Sales and Purchases.

In sales of copyhold property by public auction the particulars and conditions of sale thereon are similar to those which are used on the sale of freehold property, which have already been considered, allowance being made for the difference of tenure and the custom of the manor in which the property is situate. The mode of conducting the sale is also similar to that which takes place on the sale of freeholds.(b)

If the property sold be the freehold interest in enfranchised copyholds, the root of the title will be the deed of enfranchisement, and the purchaser has no right to call for the title to make the enfranchisement.(c)

If the copyholds it is proposed to sell lie intermixed with freeholds, there should be a condition to expressly negative the vendor's liability to identify the premises, if this would be at all difficult to do.(d)

In preparing an abstract of title to copyholds, the copies of the court rolls of the manor in which the property is situate are abstracted, as also all instruments, facts, and proofs, to show the equitable title for the period during which the title is to be carried back.(e)

The draft abstract having been prepared, a fair copy of it is made and sent to the purchaser's solicitor for his perusal, as on a sale of freeholds.(f)

The purchaser's solicitor after perusing the abstract of title(g) attends

(a) See Scriv. Cop. ch. 2.

(b) See *ante*, tit. "Sales."

(c) 44 & 45 Vict. c. 41, s. 3, sub-s. 2; *et ante*, p. 78.

(d) See *Crosse v. Lawrence*, 9 Hare, 462; *Dawson v. Brinckman*, 3 Mac. & G. 53.

(e) Prest. Ab. 202-204; 1 Prid. Conv. 145, 14th edit.; *et ante*, p. 78.

(f) See *ante*, p. 80 *et seq.*

(g) As to the mode of doing this, see *ante*, p. 100 *et seq.*

at the office of the vendor's solicitor, by appointment, to compare the abstract with the copies of the court rolls and other documents set out therein.

Subject to stipulation to the contrary, and to the modifications introduced into the law hereon by the 37 & 38 Vict. c. 78, ss. 1, 2, and the 44 & 45 Vict. c. 41, s. 3, sub-s. 2, 3, 6 (as to which see *ante*, pp. 78, 95, 96), a vendor of copyholds is bound, at his own expense, to produce to a purchaser the originals or authenticated copies, of such documents as are comprised in the abstract of title, whether on record or not.(a)

If a surrender has been made under a power of attorney, the remarks as to a deed executed under a power of attorney (*ante*, p. 109) apply.(b) And where the abstract shows a conditional surrender to a mortgagee, who has not been admitted, it must be ascertained that satisfaction has been entered up.(c)

Where an owner dies seised of or entitled to copyholds, proof must be called for that he did not leave a widow entitled to free bench. It seems that a general devise by the owner of his copyholds will deprive his widow of his dower.(d)

Inquiry should also be made as to the custom of the manor in which the lands purchased are situate as to descent, fines, heriots, &c.

The purchaser's solicitor must make an appointment with the steward of the manor in which the copyholds bought are situate, for the purpose of comparing the abstract of title with the court rolls and searching them to see that there are no transactions with the property other than those specified in the abstract, and to ascertain that the dealings with such property have been according to the custom of the manor.(e) The steward may, however, refuse to produce the court rolls to a purchaser, for he is a mere stranger to the lord of the manor until admittance; it is not usual to exercise this right, but to permit the purchaser's solicitor to compare the abstract with the court rolls; and in some manors the practice is for the steward to certify the abstract to be a full and faithful statement of the title as it appears on the rolls of the manor.(f)

This done, any requisitions on the title that may be necessary are next prepared. And the remarks made *ante*, p. 120, as to the mode of preparing requisitions on a purchase of freeholds, apply also to copyholds, subject to the difference in the tenure of the property.

The points raised by the requisitions on the title having been satisfactorily cleared up, and the title approved of, the next step is for the solicitor for the purchaser to prepare the assurance of transfer.

As a rule, copyholds on a sale pass by surrender and admittance; that is, the vendor surrenders the property to the lord of the manor to the use

(a) Scriv. Cop. 494, 7th edit.; Dart's V. & P. 352 and note, 6th edit.

(b) See Dart's V. and P. 352, 6th edit.

(c) See *ante*, p. 237.

(d) *Lacey v. Hill*, L. R. 19 Eq. 346; 32 L. T. Rep. N. S. 49; 44 L. J. 215, Ch.; 23 W. R. 285; *et ante*, p. 137.

(e) 1 Prid. Conv. 140, 11th edit.; Dart's V. & P. 566, 6th edit.; and see *ante*, pp. 158, 161, 163.

(f) Scriv. Cop. 494, 7th edit.

of the purchaser, his title being completed by his admittance as tenant of the manor, and payment of the fine due thereon.(a) Before the Conveyancing Act, 1881, it was the practice to prepare a deed of covenants, prior to or of even date with the surrender, containing any necessary recitals, a covenant to surrender, and the usual covenants for title.

By the 44 & 45 Vict. c. 41, s. 2 (v.), however, conveyance, unless a contrary intention appears, is to include a covenant to surrender made by deed, on a sale or mortgage of any property. Therefore, if a vendor is expressed to covenant to surrender copyholds as beneficial owner, covenants for title will be implied under sect. 7 of the Act.(b)

The draft surrender, and covenant to surrender(c) having been prepared, fair copies thereof are made and sent to the solicitor for the vendor for his perusal and approval. After the vendor's solicitor has returned these documents approved to the purchaser's solicitor, he has them engrossed, and they are then sent to the vendor's solicitor for examination with the drafts, and an appointment is made with the steward of the manor to take the surrender.

At the time appointed the parties attend the steward, who takes the surrender (which is usually accompanied by some symbol, as a straw, or a rod), and enters the surrender upon the court rolls of the manor. After the surrender, the purchaser has an equitable interest in the property, which is completed and turned into a legal estate by admittance.(d)

In due time the steward informs the purchaser's solicitor that the court copies of the surrender and admittance are ready on payment of his fees, and the fine due to the lord of the manor on the admittance of the purchaser as tenant.

Fines are either fixed, or arbitrary, the amount of the latter being at the will of the lord of the manor. But even when the fine is arbitrary, no more than two years' improved value of the land (deducting quit rents, but not land tax) is allowed to be taken, except under special circumstances.(e)

In the absence of stipulation to the contrary, the costs and expenses of the surrender and admittance, as well as the fees and fine due thereon, are payable by the purchaser.(f)

As to the mode in which copyhold property is mortgaged, see *ante*, p. 211; and as to leases of copyholds, see *ante*, p. 295.

Law and Practice Generally.

A copyhold tenant has a right to inspect and take copies of such parts of the court rolls of the manor as relate to his own title or privileges, although no action be pending.(g)

(a) Will. R. P. 375, 13th edit.; Scriv. Cop. ch. 3.

(b) Wolst. & B. Conv. 42, 8th edit.

(c) In some manors the steward prepares the surrender.

(d) Will. Real Pro. 375, &c., 13th edit.; Scriv. Cop. 86, 122, 7th edit.

(e) Scriv. Cop. 155, 6th edit.

(f) Sug. Conc. V. & P. 420; Scriv. Cop. 154, 6th edit.

(g) Chit. Arch. Pr. 1173, 13th edit.; Taylor, Ev. 1282, 8th edit.; Scriv. Cop. 453, 7th edit.

In the case of bankruptcy of a copyhold tenant the trustee in bankruptcy need not be admitted tenant to the bankrupt's copyholds, for he is by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), empowered to deal with them as if they had been duly surrendered to such uses as he may appoint, and his appointee will be admitted thereto (sect. 50). This saves the fine which would otherwise be payable to the lord, if the trustee were admitted.

A purchaser of copyholds must bear in mind that generally the vendor cannot pass any right to the mines and minerals under the land, or to the timber growing on the land, such rights being usually vested in the lord of the manor.(a) Nor do the mines and minerals pass to the tenant under a compulsory award of enfranchisement, without the written consent of the lord.(b)

It has already been stated that a legal estate in copyholds is passed by surrender and admittance; and although copyholds are not within the Statute of Uses, an equitable interest may be created by surrendering them to the use of trustees, as joint tenants, upon such trusts as will in equity effect the settlement required. The trustees are thus tenants to the lord, and have the legal estate. The *cestui que trust*, therefore, cannot surrender his tenancy, as he has not got one, but he may assign his equitable interest by deed. To this rule married women and tenants in tail form an exception; for the former may transfer their equitable interest by surrender or deed,(c) and the latter may bar the entail by the like means.(d)

And by the Settled Land Act, 1882, sect. 20, a deed is sufficient to pass the legal estate in copyholds, sold, &c., by the tenant for life; such deed to be entered on the court rolls.

The Dower Act (3 & 4 Will. 4, c. 105) does not apply to copyholds,(e) therefore on a sale of copyholds held of a manor in which the custom is that the widow shall have freebench out of all copyhold lands of which her husband was seized during coverture, the wife must concur in the transfer. Much, however, depends upon the custom of each manor.(f)

The local Registry Acts for Middlesex and Yorkshire do not apply to copyholds.(g) Nor can copyhold land be registered under the Land Transfer Act, 1875, except where undistinguishably intermixed with freeholds.(h)

(a) Will. R. P. 354, 12th edit.; Scriv. Cop. 289, 296, 7th edit.

(b) 57 & 58 Vict. c. 46, s. 23.

(c) As to when a married woman must be separately examined, see *ante*, pp. 18, 21.

(d) Will. R. P. 432, 16th edit.; *et ante*, pp. 18, 19, *et post*.

(e) *Smith v. Adams*, 5 D. G. M. & G. 712; 24 L. J. 258, Ch.; 2 W. R. 698.

(f) See *Dart's V. & P.* 313, 586, 6th edit.; Scriv. Cop. 69, 7th edit.

(g) *Ante*, pp. 158, 161.

(h) 38 & 39 Vict. c. 87, ss. 2, 67; *et post*, tit. "Land Transfer Acts and Rules."

The Statute *De Donis* (13 Ed. 1, c. 1) does not apply to copyholds, but they may be entailed where there is a custom of the manor to that effect. A legal entail in copyholds must be barred by surrender; but if the entail be equitable, then it may be barred either by surrender or deed. The surrender or deed requires no enrolment, except by entry on the court rolls of the manor.(a) The deed must, however, be so entered within six months after execution.(b) If there be a protector of the settlement (who is usually the first tenant for life thereof) he must consent, and if he consents by deed it must be executed either at the time of or before the surrender is made, and be entered on the court rolls of the manor. If the consent is not given by deed, it must be given to the person taking the surrender barring the entail.(c)

The further creation of manors was prohibited by the Statute *Quia Emptores* (18 Ed. 1, c. 1). And by 57 & 58 Vict. c. 46, the lord of the manor is prohibited, without the consent of the Board of Agriculture, from making grants of land (i.e., waste land) not previously of copyhold tenure to hold by copy of court roll, or by any customary tenure. And when a grant has been made under the section, the land ceases to be copyhold, and is held by the grantee in free and common socage (sect. 81). Nor can the lord enclose any common or waste land (sect. 95).

A customary court may be held for a manor although there is no copyhold tenant of the manor, and although there is no copyhold tenant present at the court, and either by the lord, or steward, or deputy steward. But this is not to apply to a court held for the purpose of receiving the consent of the homage to a grant of common or waste land to hold by copy of court roll (sect. 82).

Where a lord may grant land to hold by copy of court roll or by any customary tenure, the grant may be made out of the manor, and without holding a court; but where by the custom the lord may with the consent of the homage grant common or waste land to hold by copy of court roll, he must still have the consent of the homage assembled in a customary court (sect. 83).

A surrender may be made either in or out of court, but in either case it must be entered on the court rolls of the manor (sect. 85).

A valid admittance to copyholds may be made out of the manor, without holding a court, and without a presentment by the homage of the surrender (sect. 84).

A person may be admitted by his attorney duly appointed, whether orally or in writing (sect. 84, sub-sect. 2). Every admittance must be entered on the court rolls (sect. 85).

As already stated, copies of the court rolls on which the above instruments are entered form the copyholder's documents of title.(d)

(a) 3 & 4 Will. 4, c. 74, ss. 50, 54.

(b) *Honeywood v. Forster*, 30 Beav. 1; 4 L. T. Rep. N. S. 785; 9 W. R. 853.

(c) 3 & 4 Will. 4, c. 74, ss. 51-53.

(d) Sug. V. & P. 432, 14th edit.

A surrenderee of copyholds cannot surrender them until he has been admitted,^(a) but he may assign his interest.^(b)

The person making a grant of lands to be held of copyhold tenure must be *legitimus dominus pro tempore*.^(c) However, by 57 & 58 Vict. c. 46, in the Act, the expression "lord" means a lord of a manor, whether seized for life, in tail, or in fee, &c., or the person for the time being filling the character of or acting as lord whether lawfully entitled or not, &c. (sect. 94).

Copyhold estates may be devised by will without any surrender to the use of the will, or although the testator has not been admitted; but the will or so much as contains such disposition must be entered on the court rolls, and when trusts thereof are declared, it is not necessary to enter the declaration of such trusts, but it is sufficient to state that such estate is subject to the trusts declared by the will; and when any such estate could not have been disposed of by will, if the Act had not been passed, the same fine, &c., must be paid by the devisee as would have been due from the customary heir in case of descent.^(d)

Where copyholds are devised to several trustees they must be admitted and pay the fine. But as trustees are made joint tenants they make only one tenant and pay one fine, which, on copyholds of inheritance, is calculated thus: two years' value for the first joint tenant, half of that for the second, and half of that for the third.^(e) And in order to avoid payment of such a fine, where a testator wishes his copyhold estate to be sold by the trustees of his will after his death, it is the practice not to devise such estate to the trustees upon trust to sell, but to insert in the will a mere power that the trustees may appoint the estate. This mode, however, is only applicable where the estate is to be sold immediately after the testator's death.^(f)

Tenants in common are admitted severally, and pay several fines.^(g)

Generally the admittance of a tenant for life enures for the benefit of those in remainder,^(h) unless there is a special custom to the contrary.⁽ⁱ⁾

It has already (*ante*, p. 29) been shown that pt. 1 of the Land Transfer Act, 1897, does not apply to copyholds.

There is a peculiar species of copyholds called customary freeholds. The freehold and fee simple are usually both in the lord, but they are not held at his will, as copyholds are. In general, however, their incidents are similar to those of common copyholds; thus, the tenant cannot grant a

(a) *Scriv. Cop.* 97, 116, 7th edit.

(b) *Hall v. Bromley*, 35 Ch. Div. 642; 56 L. J. 722, Ch.

(c) *Rous v. Artois*, 2 Leo. 45; *Scriv. Cop.* 26, 7th edit.

(d) 1 Vict. c. 26, ss. 3, 4, 5.

(e) *Scriv. Cop.* 164, 6th edit.; *Lewin, Trusts*, 253, 10th edit.

(f) 7 Byth. & Jar. Conv. 848, 4th edit.; *Scriv. Cop.* 158, 7th edit.

(g) *Scriv. Cop.* 123, 166, 6th edit.

(h) *Scriv. Cop.* 181, 7th edit.; *Smith v. Glasscock*, 27 L. J. 192, C. P.

(i) *Doe v. Jenny*, 5 East, 521.

lease without the lord's licence. However, they are in some cases conveyed by deed of grant, or bargain and sale, instead of by surrender; the tenant must, however, be admitted to complete his title.^(a)

Enfranchisement of Copyholds.

Compulsory Enfranchisements.—The Copyhold Act of 1894 (57 & 58 Vict. c. 46) repeals the former Acts hereon, and makes provision for both the compulsory and voluntary enfranchisement of copyholds. By this Act where there is an admitted tenant of copyhold land the lord or the tenant may, subject as in the Act mentioned, compel enfranchisement; but this is not to apply where the tenant is admitted in respect of a mortgage and the mortgagee is not in possession (sect. 1). And the provisions of the Act with respect to compulsory enfranchisement are not to apply to (1) any copyholds held for life or years where the tenant has not a right of renewal; nor (2) to manors in which Her Majesty has any estate (sect. 96). A tenant cannot require enfranchisement until after payment or tender (1) in the case of copyhold land and an admittance thereto has not been made since 30th June, 1853,^(b) of such fine and the value of such heriot (if any) as would be payable on an admittance on alienation subsequent to that day, and of two-thirds of the steward's fees; and (2) in the case of customary freeholds subject to heriots and no heriot has become due or payable since the above date, of the value of such heriot (if any) as would become payable in the event of an admittance or enrolment on alienation, subsequent to the above date, and of two-thirds of the steward's fees; and (3) in every other case, of all fines and fees consequent on the last admittance to the land (sect. 3).

The party requiring enfranchisement must give written notice to that effect to the other (sect. 4). When notice has been given the lord and tenant may (1) determine the amount of compensation by agreement in writing; or (2) agree in writing that the Board of Agriculture shall determine it; or (3) appoint a valuer or valuers to determine it; otherwise the compensation is to be ascertained under the direction of the Board of Agriculture on a valuation made by a valuer or valuers appointed by the lord and tenant; or, in the events stated in the Act, by a valuer to be appointed by justices at petty sessions, unless either party gives notice that he desires the valuation to be made by a valuer or valuers appointed by the lord and tenant. The appointment of a valuer by either party cannot be revoked except with the consent of the other party. In certain events further power is given to the Board of Agriculture (sect. 5).

In making a valuation the valuers are to take into account and make allowance for the facilities for improvements, customs of the manor, fines, heriots, reliefs, quit rents, chief rents, forfeitures, and all other incidents whatever of copyhold or customary tenure, and all other

(a) Scriv. Cop. 14-19, 7th edit.; Whart. Law Lex.

(b) This date was first fixed by the Copyhold Act, 1852.

circumstances affecting or relating to the land included in such enfranchisement, and all advantages to arise therefrom, but they are not to take into account or allow for the value of escheats (sect. 6).

The valuers are to give their decision within forty-two days after their appointment, &c., or the Board of Agriculture may interfere (sect. 7).

Compensation.—Where (1) the enfranchisement is at the instance of the lord, or (2) where the land can, in the opinion of the Board of Agriculture, be sufficiently identified, and the compensation amounts to more than one year's improved value of the land, then, unless the parties otherwise agree, or the tenant within ten days after receipt of the draft of the proposed award of enfranchisement gives to the board written notice that he desires to pay the compensation in a gross sum, the compensation is to be an annual rent charge issuing out of the land enfranchised, equivalent to interest at four per cent. per annum on the amount of the compensation; and (3) except where this section provides that the compensation is to be by way of rent charge, it is to be paid in a gross sum before completion of the enfranchisement (sect. 8).

On a compulsory enfranchisement the tenant must pay the steward's compensation, according to the scale in the 2nd sched. to the Act (sect. 9).

The Award.—When the compensation for a compulsory enfranchisement is ascertained, the Board of Agriculture make an award of enfranchisement, and unless already perused, send copies to the tenant and the steward, which, after fourteen days, may be confirmed by the board, and a sealed copy of the confirmed award is sent to the lord for entry on the court rolls of the manor (sect. 10).

Restrictions on Enfranchisement.—It has already been stated in certain cases a compulsory enfranchisement cannot be required. And the Act further provides that where the tenant gives a notice requiring enfranchisement, and the lord shows to the satisfaction of the Board of Agriculture that any change in the condition of the land, which but for the enfranchisement would or might be prevented by the incidents of the tenure of the land, will prejudicially affect the enjoyment or value of the mansion house, park, gardens, or pleasure grounds of the lord, he may make the tenant a written offer to purchase his interest in the land. If the tenant refuses the offer the enfranchisement is not to take place unless the board think fit to impose terms sufficient to protect the interests of the lord (sect. 11). And the Board of Agriculture may suspend any proceedings for a compulsory enfranchisement under the Act where any peculiar circumstances make it impossible in their opinion to decide on the prospective value of the land proposed to be enfranchised, or where special hardship or injustice would unavoidably result from compulsory enfranchisement (sect. 12).

So where the land is held of a manor belonging to an ecclesiastical corporation, notice of the proceedings are to be given to the Ecclesiastical Commissioners, who may assent or dissent in regard thereto (sect. 73).

Manorial Rights.—By sect. 2 of the Act power is given to a lord or tenant to compel the extinguishment of any heriot, quit rent, or other manorial incident affecting the land, and the release and enfranchisement

of the land subject thereto, in like manner, as nearly as possible, as is provided by the Act for the compulsory enfranchisement of copyhold land (sect. 2).

Voluntary Enfranchisement.

The lord may, with the consent of the Board of Agriculture, enfranchise any land held of the manor, and the tenant may, with the like consent, accept the enfranchisement, on such terms as, subject to the Act, are agreed upon between the lord and the tenant; but if the estate of either is less than a fee simple in possession or corresponding copyhold or customary estate, and the tenant has not paid the whole of the cost of enfranchisement, the lord or tenant respectively must give written notice of the proposed enfranchisement to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by the enfranchisement (sect. 14).

The consideration for a voluntary enfranchisement under the Act may be either (i.) a gross sum payable at once or at a time fixed; or (ii.) a rent charge charged on and issuing out of the land enfranchised; or (iii.) a conveyance of land or of a right to mines or minerals; or (iv.) a conveyance of a right to waste in lands belonging to the manor, or partly in one such way and partly in another. It may be a conveyance of land or a right to mines or minerals subject to the same or corresponding uses and trusts with the land enfranchised. And if the lord's estate is less than a fee simple in possession, and land not parcel of the manor, or a right to mines or minerals not under the enfranchised land, is conveyed, the land or right must be convenient in the opinion of the Board of Agriculture to be held with the manor, and be settled to uses or trusts corresponding to those on which the manor is held (sect. 15; see also sects. 17, 18).

A voluntary enfranchisement under the Act may be effected with the consent of the Board of Agriculture by deed. But if a person is entitled to notice of the proposed enfranchisement, and he dissents in writing, the Board are to withhold their consent until satisfied that the agreement is fair (sect. 16).

Any sum payable to the lord for the enfranchisement is to be a charge upon the land enfranchised with interest thereon until payment (sect. 19).

By sect. 72, an agreement for an enfranchisement is not to be valid where the manor or land to be affected is held under a corporation; or where any such corporation, &c., is interested to the extent of one-third of the value thereof; or where in the opinion of the Board of Agriculture the corporation would be affected by the enfranchisement, unless the agreement is made with the written consent of the corporation, &c.

Consideration Money, &c.

The receipt of any person for any money paid to him under the Act is to be a sufficient discharge for the money, and the payer need not see to its application, and is not liable for its misapplication or loss (sect. 25).

The compensation money for an enfranchisement may, subject to the

Act, be paid to the lord for the time being; but if he has only a limited estate in the manor, and the money exceeds 20*l.* for all the enfranchisements, the Board of Agriculture must direct it to be paid into court or to trustees as provided by the Act; and if it does not exceed 20*l.*, may direct it either to be paid as aforesaid, or to be retained by the lord for his own use; and if the lord's title afterwards proves to be bad, the rightful owner of the manor may recover the amount from him with interest at five per cent. per annum (sect. 26).

Enfranchisement money to be paid for the use of a spiritual person in respect of his benefice may at the option of the lord be paid to Queen Anne's Bounty (sect. 74); and in certain other cases it may be paid to the official trustees of charitable funds in trust for the charity (sect. 76; see also sect. 77).

The tenant may charge the enfranchised land with the compensation money, and his expenses, and interest thereon not exceeding five per cent. per annum, or by way of terminable annuity calculated on the same basis (sect. 36).

Rent Charges.—A rent charge created under the Act is to be payable half-yearly on 1st January and 1st July; and is to be a first charge on the land charged therewith, having priority over all incumbrances affecting the land except tithe rent charge and any charge having priority by statute; and is to be recoverable by the like remedies as are provided by sect. 44 of the Conveyancing Act of 1881 (44 & 45 Vict. c. 41) in respect of rent charges created after that Act (sect. 27). Provision is also made for the apportionment of a rent charge created under the Act (sects. 28, 29); also for its redemption (sect. 30); and for its sale where the owner has only a limited estate therein, or is a corporation not authorised to sell (sect. 31).

Limited Owners, &c.—Anything by the Act required or authorised to be done by a lord or tenant may be done by him notwithstanding that his estate in the manor or land is a limited one (sect. 43), or that he is a trustee (sect. 44). An infant is to act by his guardian, and a lunatic by his committee, and a person abroad by his authorised attorney; or a fit person may be appointed by the Board of Agriculture to represent him (sect. 45). A married woman being lady of a manor or tenant, is, for the purposes of the Act, to be deemed to be a *feme sole* (sect. 46). A lord may act personally, or by his steward, or agent (sects. 47, 48); so a lord or tenant may by power of attorney appoint an agent (sect. 48).

Abatement.—Proceedings relating to enfranchisement are not to abate by the death of the lord or tenant (sect. 49).

Expenses, &c.—The expenses of a compulsory enfranchisement are to be borne by the person requiring it; and the expenses of a voluntary enfranchisement by the lord and tenant in such proportions as they agree, or in default of agreement as the Board of Agriculture direct (sect. 34). The expenses of proceedings may be recovered (1) as a debt; and (2) if in respect of a compulsory enfranchisement and the amount is certified by an order of the Board of Agriculture, in any way provided by the Act for the recovery of the consideration for the enfranchisement;

or (3) when certified as above, by warrant of distress from a court of summary jurisdiction; and (4) if the money is payable by a lord to a tenant, &c., it may be set off against any money receivable by the lord from the tenant, &c. A trustee tenant paying the expenses may recover them against the *cestui que trust*, and an occupier doing so may deduct the amount from his next rent (sect. 35).

Expenses incurred by the lord may (1) be paid out of the enfranchisement money, or (2) be charged on the manor or on land settled to the same uses as the manor, &c. (sect. 37).

It has already (*ante*, p. 383) been stated that the tenant may charge the enfranchised land with his expenses (sect. 36).

Effect of Enfranchisement, &c.

After an enfranchisement under the Act takes effect, the land is to be of freehold tenure; but in case of an escheat for want of heirs the lord is entitled to the same right as if the land had not been enfranchised (sect. 21, sub-sect. 1).

The land is not to be subject to the custom of gavelkind, borough English, or any other customary mode of descent, or custom relating to dower, freebench, or curtesy, &c., but is to be subject to the same laws relating to descent, dower, and curtesy as are applicable to land held in free and common socage. However, this is not to affect the custom of gavelkind in Kent; and the provisions as to dower, freebench, or curtesy are not to apply to a person married before the enfranchisement takes effect, &c. (sub-sect. 1, and sect. 95).

Every mortgage of the copyhold estate in the land is to become a mortgage of the freehold for a corresponding estate, but subject to any charge having priority thereof by force of the Act (sub-sect. 1; and see sub-sect. 2). And where the land is at the time of the enfranchisement subject to a subsisting lease, the freehold into which the copyhold is converted is to be the reversion immediately expectant on the lease, and the rents, &c., and conditions are to be incident and annexed to the reversion, and the covenants are to run with the land and reversion respectively (sub-sect. 3).

The tenant's commonable rights in respect of the enfranchised land are preserved to him (sect. 22). And the rights of the lord or tenant respectively to any mines or minerals, &c., whether in or under the enfranchised land or not, and the rights of the lord respecting any fair, market, chase, shooting, fishing, &c., are to remain unaffected by the enfranchisement save by the express consent in writing of the lord or tenant (sect. 23).

Any person interested in the land enfranchised may at any time inspect and obtain copies of the court rolls of the manor on payment of the fees (sect. 62).

Stamp Duty.—An agreement, valuation, or power of attorney under the Act is not chargeable with stamp duty. An enfranchisement award is chargeable with the like stamp duty as an enfranchisement deed; and a

certificate of charge and a transfer thereof with the like stamp duty as a mortgage and a transfer thereof respectively (sect. 58).

Notice of Right to Enfranchise.—The Act also provides that on the admittance or enrolment of any tenant, the steward must, without charge, give to such tenant a notice of his right to obtain enfranchisement. If the steward neglects to give such notice he is not entitled to any fee for that admittance or enrolment (sect. 42). The notice must state that the tenant is entitled to enfranchise his copyhold land on payment of the lord's compensation and the steward's fees; and that such compensation may be fixed by agreement between the lord and tenant or by valuers appointed by them, or through the agency of the Board of Agriculture (sched. 1).

Enfranchisement under the Settled Land Act, 1882.—The Copyhold Act, 1894, provides that nothing therein shall interfere with the exercise of any powers contained in any other Act of Parliament (sect. 95, e). By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3, a tenant for life of settled land(a) may, where the settlement comprises a manor, sell the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of mines or minerals, &c., so as in every such case to effect an enfranchisement (sect. 3, ii.). This statute will, however, be further considered in a subsequent chapter.

(a) Which includes those having the powers of a tenant for life, see *ante*, p. 292.

CHAPTER IX.

TITLE BY POSSESSION, ETC.

WE have in previous pages treated of titles created by grant or conveyance. A title to lands and tenements, may, however, arise, not only by grant, but also by mere possession and effluxion of time.^(a) Thus, if a purchaser, through carelessness in investigating the title to the estate he has bought, has become possessed of it by a defective title, it is yet desirable that the rightful owner should be limited as to the time within which he may bring an action to recover possession of the property.

The Statutes of Limitation.

From 1833 to 1st January, 1879, the law as to the limitation of time for the recovery of land was chiefly regulated by the 3 & 4 Will. 4, c. 27; from 1st January, 1879, however, it is regulated by the joint operation of the unrepealed sections of the above Act and the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, ss. 9, 12). The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), however, introduces a new clause as to title by possession of registered land (sect. 12), which will be found set out subsequently.

By 37 & 38 Vict. c. 57, from 1st January, 1879, no person can make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to do so first accrued to him, or to some person through whom he claims (sect. 1).

Under 3 & 4 Will. 4, c. 27, s. 2, the period allowed was twenty years. This section is repealed by sect. 9 of the Act of 1874.

Sect. 3 of 3 & 4 Will. 4, c. 27, points out when the right is deemed to have accrued in certain cases; and sect. 7 when it is deemed to have accrued in the case of a tenancy at will.^(b)

In case of reversions, remainders, or other future estates, the time is, by 37 & 38 Vict. c. 57, s. 2, limited to twelve years after the termination

(a) See as to compelling a purchaser to take a possessory title, *ante*, p. 71.

(b) See *Lynes v. Snaith*, (1899) 1 Q. B. 486; 80 L. T. Rep. N. S. 122.

of the prior estate, or the dispossession of the tenant thereof, or six years after the reversion, &c., vests in possession, whichever period is the longer.(a)

Under the 3 & 4 Will. 4, c. 27, the remainderman or reversioner had twenty years from the time when his reversion or remainder came into possession (sect. 5). This section is, however, repealed by sect. 9 of the Act of 1874. See, however, sects. 21 & 22 of 3 & 4 Will. 4, c. 27, and sect. 6 of 37 & 38 Vict. c. 57, as to a remainder after an estate tail.

Sect. 14, of 3 & 4 Will. 4, c. 27, provides that when any acknowledgment of the title of the person entitled to the land or rent has been given to him or his agent in writing, signed by the person in possession or receipt of the profits of such land, or of such rent, then such possession or receipt of or by the person giving the acknowledgment is to be deemed to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and his right to make an entry, or distress, or sue to recover such land or rent is to be deemed to have first accrued at the time of such acknowledgment, or the last of them if more than one.

As to what amounts to an acknowledgment under this section: if the question turns on the mere construction of a written document it is for the court; but if it is to be explained by extrinsic facts, the whole must be submitted to a jury.(b) An answer in a suit in chancery in which the defendant had acknowledged the plaintiff's title was held to be a sufficient acknowledgment of title in a subsequent action of ejectment in regard to the same property.(c)

By 37 & 38 Vict. c. 57, it is provided that if, when the right to make the entry or distress or to bring an action or suit first accrued, the person so entitled was under the disability of infancy, coverture, idiocy, lunacy, or unsoundness of mind, then notwithstanding the period of twelve years or six years, as the case may be, have expired, such person has, six years from the time the disability ceased, to make the entry, &c. (sect. 3), but so that the whole period, including the time of disability, does not exceed thirty years (sect. 5).

Under 3 & 4 Will. 4, c. 27, the periods were twenty, ten, and forty years respectively. And absence beyond seas of the person having the right to make the entry, &c., was also a disability (sects. 16, 17). These sections are now repealed by sect. 9 of the Act of 1874; and sect. 4 expressly enacts that absence beyond seas of such person is not to be a disability after the commencement of the Act. And the disability of coverture must be read in connection with the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1 (2) of which enacts that a married

(a) See also *Greenw. R. P. Stats.* 19, 22; *Darby & Bos. St. Limit.*, 324, 2nd edit.; *Pedder v. Hunt*, 18 Q. B. Div. 565; 56 L. J. 212 Q. B.; 56 L. T. Rep. N. S. 687; *Hugill v. Wilkinson*, 38 Ch. Div. 480; 57 L. J. 1019, Ch.; 36 W. R. 633.

(b) *Greenw. R. P. Stats.* 36; *Darby & Bos. St. Limit.*, 382, 2nd edit.; *Morrell v. Frith*, 3 M. & W. 402.

(c) *Goode v. Job*, 28 L. J. 1, Q. B.

woman may sue and be sued either in contract, or in tort, or otherwise as if she were a *feme sole*, without her husband being joined as a party. And by sect. 12, every woman, whether married before or after the Act, is to have in her own name against all persons, including her husband, the same civil remedies for the protection of her own separate property, as if it belonged to her as a *feme sole*. It seems, therefore, that this Act has put an end to coverture as a disability under sect. 3 of 37 & 38 Vict. c. 57, so far as regards the separate property of a married woman who comes within the provisions of the Married Women's Property Acts.^(a) And it has already been held that since the commencement of that Act she is, as to suing in her own name, a *feme discover* within the Statute of Limitations, 21 Jac. 1, c. 16.^(b)

By 3 & 4 Will. 4, c. 27, it is provided that equitable estates are to be barred within the same time as legal estates (sect. 24); but by the following section it is enacted that if the land or rent be vested in a trustee upon an *express* trust the right of the *cestui que trust*, or any person claiming through him to bring a suit against the trustee to recover the land or rent, is to be deemed to have first accrued at the time at which it had been conveyed to a purchaser for value (sect. 25). However, we shall refer to the subject of trusts subsequently.

By sect. 26, in every case of concealed fraud the right of any person to sue in equity to recover any land or rent of which he or any person through whom he claims may have been deprived by such fraud, is to be deemed to have first accrued at the time at which such fraud is, or with reasonable diligence might have been, first known or discovered; but this is not to enable any owner of lands or rents to sue in equity for the recovery of such lands or rents or for setting aside any conveyance thereof on account of fraud against a *bonâ fide* purchaser for value who has not assisted in the commission of such fraud, and who at the time of his purchase had no reason to believe that any such fraud had been committed.

And by sect. 27, nothing in the Act is to be deemed to interfere with any rule or jurisdiction of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to sue may not be barred by the Act.

By sect. 1 the word "land" extends to manors, messuages, and all other corporeal hereditaments whatever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest therein, whether the same be a freehold or chattel interest, and whether freehold or copyhold, or other tenure; and the word "rent" extends to heriots and services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.

(a) See *ante*, p. 15.

(b) *Lowe v. Fox*, 15 Q. B. Div. 667; 54 L. J. 561, Q. B.; 34 W. R. 144, C. A.; *Weldon v. Neal*, 51 L. T. Rep. N. S. 289; 32 W. R. 828.

An action to obtain an assignment of dower is an action to recover an interest in land.(a)

The term "rent" has been held not to apply to a rent reserved on a demise as between landlord and tenant; therefore the reversioner expectant on the lease may distrain or sue for rent at any time during the existence of the lease, although no payment has been made for more than twelve years.(b) A rent charge is, however, a "rent" within the Act.(c)

Mortgages.—By the 37 & 38 Vict. c. 57, s. 7, it is enacted that, when a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, must bring an action or suit to redeem the mortgage within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the mortgagor's title, or right to redeem, has been given to him, or to the person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him, and then such action or suit must be brought within twelve years next after such acknowledgment, or the last of them, if more than one was given. If there are several mortgagors, &c., an acknowledgment given to one of them is as effectual as if given to all; but if there are several mortgagees, &c., an acknowledgment signed by one or more of them is only effectual as against the party or parties signing, &c.

It has been held that the above period is an absolute bar, and is not extended by any disability of the mortgagor; for a mortgagee in possession often lays out large sums of money on the estate.(d)

Under 3 & 4 Will. 4, c. 27, the period was twenty years (sect. 28), but sect. 28 is repealed as from 1st January, 1879, by sect. 9 of the Act of 1874.

Where freeholds, copyholds, and a life policy were mortgaged to secure one undivided amount and subject to one and the same proviso for redemption, and on default in repayment the mortgagee took possession of the freeholds and copyholds, and the right of redemption became barred under sect. 7 of 36 & 37 Vict. c. 57, and subsequently the person on whose life the policy was granted died, it was held that the right to redeem the policy was also barred, not by analogy to the Statute of Limitation, but because the realty and the policy were intended to form one security for one debt and subject to one proviso for redemption.(e)

By sect. 8 of 37 & 38 Vict. c. 57, no action or suit to recover any

(a) *Marshall v. Smith*, 34 L. J. 189, Ch.; 11 L. T. Rep. N. S. 443.

(b) *Grant v. Ellis*, 9 M. & W. 113; *Archbold v. Sculley*, 9 H. L. Cas. 360; 5 L. T. Rep. N. S. 160, H. L.; *et ante*, p. 320, *et post*.

(c) *Jones v. Withers*, 74 L. T. Rep. N. S. 572, C. A.

(d) *Forster v. Patterson*, 17 Ch. Div. 132; 50 L. J. 603, Ch.; 44 L. T. Rep. N. S. 465; 29 W. R. 463.

(e) *Charter v. Watson*, 79 L. T. Rep. N. S. 440; 68 L. J. 1, Ch.; (1899) 1 Ch. 175; 47 W. R. 250.

money secured by any mortgage, judgment,^(a) or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, can be brought but within twelve years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of principal money or some interest thereon has been paid, or some written acknowledgment of the right thereto has been given signed by the person by whom the same is payable or his agent, to the person entitled thereto or his agent; and then within twelve years after such payment or acknowledgment, &c. (sect. 8).

Under the 3 & 4 Will. 4, c. 27, s. 40, the period was twenty years; but sect. 40 is repealed as from 1st January, 1879, by sect. 9 of the Act, 1874.

By 3 & 4 Will. 4, c. 42, s. 3, however, all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, &c., must be brought within twenty years after the cause of such action or suit (sect. 3); allowing the same period in case the person entitled to sue is an infant, a *feme covert*,^(b) or *non compos mentis*, after any such disability ceases (sect. 4). Absence beyond seas of the person entitled to sue was also a disability within the section, but was taken away by 19 & 20 Vict. c. 97, s. 10. Absence beyond seas of a debtor, however, is still a disability under sect. 4 of 3 & 4 Will. 4, c. 42.

By sect. 5 of 3 & 4 Will. 4, c. 42, if any acknowledgment has been made, either by writing signed by the party liable or his agent, or by part payment on account of principal or interest then due, the person entitled may sue for the money remaining unpaid, within twenty years after such acknowledgment, or within twenty years after any of the above disabilities have ceased.

It has been decided on the construction of sect. 8 of 37 & 38 Vict. c. 57, and sect. 3 of 3 & 4 Will. 4, c. 42, that where money is charged upon land, and is also secured collaterally by covenant or bond of even date of the debtor, then, when the remedy against the land is barred by lapse of twelve years, the remedy on the collateral security is also barred by sect. 8 of 37 & 38 Vict. c. 57.^(c) But it seems that if the bond of even date is given by a third person as surety to secure the debt, and not by the debtor, it is otherwise, for then the debts or claims are different debts and not one and the same debt, and the bond debt is not barred by the lapse of twelve years.^(d) However, in an action against a mortgagor and his surety, who in the mortgage deed had jointly and severally covenanted to pay the mortgage debt and interest, Cotton, L. J., decided that sect. 8 was applicable to an action against a surety as well as to one against the mortgagor; but Bowen, L. J., was of opinion that the section did not

(a) See *ante*, p. 165, note as to what the expression "judgment" includes.

(b) As to a *feme covert*, see *ante*, p. 388.

(c) *Sutton v. Sutton*, 22 Ch. Div. 511; 52 L. J. 333, Ch.; 48 L. T. Rep. N. S. 95; 31 W. R. 369, C. A.; *Fearnside v. Flint*, 22 Ch. Div. 579; 52 L. J. 479, Ch.; 31 W. R. 318; 48 L. T. Rep. N. S. 154.

(d) *Re Powers*; *Lindell v. Phillips*, 30 Ch. Div. 291; 53 L. T. Rep. N. S. 647, C. A.

apply to a personal action on a covenant in a mortgage deed unless brought against the mortgagor.(a) But it was not necessary to decide this point in the particular case, and it is not clear whether Cotton, L. J., confined his remarks to this particular case, as he was of a different opinion in the case of *Re Powers*, noticed above.

It has also been held that where a simple contract debt is also secured by a charge upon land, sect. 8 of 37 & 38 Vict. c. 57, does not deprive the debtor of the benefit of the Stat. 21 Jas. 1, c. 16, s. 3, which prevents the recovery of a debt without specialty after the lapse of six years from the accruing of the cause of action.(b)

On the other hand, as there is no Statute of Limitations applicable to the foreclosure of personal property, an equitable charge on shares in a company made by deposit of the certificate thereof to secure a simple contract debt, may be enforced by action against the property although the debt is statute barred.(c)

Sect. 7 of 3 & 4 Will. 4, c. 27, enacts as to the accrual of the cause of action against a tenant at will in possession of any land, but provides that no mortgagor or *cestui que trust* is to be deemed to be tenant at will within the section to his mortgagee or trustee.

It has been held that an action for foreclosure is an action to recover land, and will now, therefore, come within the provisions of sect. 1 of 37 & 38 Vict. c. 57 (*ante*, p. 386), and not within those of sect. 8 (*ante*, p. 389), as it formerly came within the provisions of sect. 2 of 3 & 4 Will. 4, s. 27, and not of those of sect. 40; and is within the supplementary Stat. 1 Vict. c. 28;(d) which enacts (as amended by 37 & 38 Vict. c. 57) that any person entitled to or claiming under any mortgage of *land* may make an entry or bring an action at law or suit in equity to recover such land within twelve years next after the last payment of any part of the principal money or interest, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit first accrued.

Arrears of Rent, &c.—The Stat. 3 & 4 Will. 4, c. 27, s. 42, enacts that no arrears of rent or of interest in respect of any money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by distress, action, or suit, but within six years next after the same respectively shall have become due, or next after a written acknowledgment of the same shall have been given to the person entitled

(a) *Re Frisby*; *Allison v. Frisby*, 43 Ch. Div. 106; 59 L. J. 94, Ch.; 61 L. T. Rep. N. S. 632; 38 W. R. 65.

(b) *Barnes v. Glenton*, 68 L. J. 502, Q. B.; (1899) 1 Q. B. 885; 80 L. T. Rep. N. S. 607, C. A.

(c) *London and Midland Bank v. Mitchell*, (1899) 2 Ch. 161; 68 L. J. 569, Ch.; 81 L. T. Rep. N. S. 263; 47 W. R. 602; *Re Lake's Trusts*, (1890) 63 L. T. Rep. N. S. 416.

(d) *Harlock v. Ashberry*, 19 Ch. Div. 539; 51 L. J. 394, Ch.; 46 L. T. Rep. N. S. 356; 30 W. R. 327, C. A.; *Pugh v. Heath*, 7 App. Cas. 235; 51 L. J. 367, Q. B.; and see *London and Midland Bank v. Mitchell*, *sup.*

thereto or his agent, signed by the person by whom the same was payable or his agent (sect. 42). However, as already stated by 3 & 4 Will. 4, c. 42, s. 3, twenty years are fixed as the period within which actions of covenant may be brought. And it has been held on the construction of these two statutes that no more than six years' arrears of rent, or interest in respect of any sum charged upon or payable out of land or rent, can be recovered by distress, action, or suit other than and except in actions upon covenant or debt upon specialty, in which event the limitation is to be twenty years' arrears.(a) And in an action on a covenant contained in a mining lease against the lessee to recover arrears of royalties, it was held that 37 & 38 Vict. c. 57, s. 8, did not apply, and that as against the covenantor twenty years' arrears were recoverable.(b)

Where the party claiming is not compelled to bring an action or suit to recover the arrears of interest, the 3 & 4 Will. 4, c. 27, s. 42, does not apply; therefore where a mortgagee sold under his power of sale, he was allowed to retain out of the proceeds thereof more than six years' arrears of interest.(c)

And it has recently been held that where a mortgagor takes proceedings to redeem, he will only be allowed to do so on payment of all arrears of interest, although there may be more than six years' arrears due.(d) And prior to the last stated case it had been held that as the 3 & 4 Will. 4, c. 27, s. 42, applies to rent or interest arising out of land, more than six years' arrears of interest may be allowed on money secured by a mortgage of an interest in personal estate in a claim for redemption.(e)

An annuity given by will and not charged upon land is not "rent" within 3 & 4 Will. 4, c. 27, s. 42.(f) Therefore, in the case of a personal annuity given by will, it will now, like a legacy, be governed by sect. 8 of 37 & 38 Vict. c. 57, and twelve years' arrears may be recovered.(g) If an annuity is charged upon land, it then becomes "rent" within the meaning of sect. 42 of 3 & 4 Will. 4, c. 27, and not more than six years' arrears are recoverable.(h) And if no proceedings are taken to recover the arrears within twelve years from the time when the right accrued, it has been held that such arrears cannot be recovered.(i)

As to an acknowledgment: generally speaking, the provisions of sect. 8 of 37 & 38 Vict. c. 57 (formerly sect. 40 of 3 & 4 Will. 4, c. 27), and

(a) *Hunter v. Nockolds*, 1 M. & G. 641; 19 L. J. 177, Ch.; *Shaw v. Johnson*, 4 L. T. Rep. N. S. 461; 30 L. J. 646, Ch.; *et ante*, p. 320.

(b) *Darley v. Tenant*, 53 L. T. Rep. N. S. 257.

(c) *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Marshfield v. Hutchings*, 34 Ch. Div. 721; 56 L. J. 599, Ch.; 35 W. R. 491.

(d) *Dingle v. Coppen*, 79 L. T. Rep. N. S. 693; 47 W. R. 279; (1899) 1 Ch. 726; 68 L. J. 337, Ch.

(e) *Mellersh v. Brown*, 45 Ch. Div. 225; 60 L. J. 43, Ch.; 38 W. R. 732.

(f) *Roch v. Callen*, 6 Hare 531; 17 L. J. 144, Ch.

(g) See *Darby & Bos. St. Limit.* 194, 2nd edit.

(h) *Francis v. Grover*, 5 Hare 39; 15 L. J. 99, Ch.

(i) *Hughes v. Coles*, 27 Ch. Div. 231; 53 L. J. 1047, Ch.; and see *Dowser v. Dowser*, 15 L. R. Ir. 264.

of sect. 42 of 3 & 4 Will. 4, c. 27 (*ante*), are so nearly identical that the same rules of construction apply, and the cases decided on one of these sections apply to the others. (a) An acknowledgment under these sections must not only be made and signed by the party liable or his agent, but must also be given to the party entitled or his agent. (b) Whereas an acknowledgment under sect. 5 of 3 & 4 Will. 4, c. 42 (*ante*, p. 390), need not be made to the person entitled. (c)

It seems that a written acknowledgment given to a mortgagee by one of two executors and trustees of a testator's realty and residuary personalty, that more than six years' arrears of interest are due upon the debt, will not take the case out of sect. 42 of 3 & 4 Will. 4, c. 27, as regards the realty in an action of foreclosure. (d)

As to payment: the words "have been paid" in sect. 40 of 3 & 4 Will. 4, c. 27, now 37 & 38 Vict. c. 57, s. 8 (*ante*, p. 389), mean paid "by the person liable to pay;" therefore a payment of interest by a mere stranger would not prevent the operation of the statute. (e)

It seems now established that where a tenant for life of real estate of a testator makes a part payment of, or payment of interest on account of, a mortgage debt of a testator, such payment will keep alive the debt as against the persons entitled in remainder. (f)

By 3 & 4 Will. 4, c. 27, no arrears of dower can be recovered by action or suit for more than six years next before the commencement thereof (sect. 41). It will be noticed this section contains no exception in case of the widows' disability, &c.

Trustees.—It has already been stated that by 3 & 4 Will. 4, c. 27, as between trustee and *cestui que trust*, time was not to run where land or rent was held on an express trust (sect. 25). And by 36 & 37 Vict. c. 66, s. 25, it is enacted that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of trust, is to be held to be barred by any statute of limitations (sub-sect. 2). The 37 & 38 Vict. c. 57, however, provides that no action or suit is to be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, and secured by an *express* trust, or to recover any arrears of rent, or interest, in respect of any sum of money or legacy so charged, &c., except within the time within which the same would be recoverable if there were not any such trust (sect. 10).

It seems that 36 & 37 Vict. c. 66, s. 25 (2), applies between trustee

(a) Darby & Bos. St. Limit. 220, 2nd edit.

(b) *Holland v. Clark*, 1 Y. & C. C. 151.

(c) *Moodie v. Bannister*, 4 Drew. 433.

(d) *Astbury v. Astbury*, (1898) 2 Ch. 111; 67 L. J. 471, Ch.; 78 L. T. Rep. N. S. 494; 46 W. R. 536.

(e) *Chinnery v. Evans*, 11 H. L. Cas. 115; 11 L. T. Rep. N. S. 68; *Harlock v. Ashberry*, 19 Ch. Div. 539, *et ante*, p. 390.

(f) *Pears v. Laing*, L. R. 12 Eq. 41; 40 L. J. 225, Ch.; 24 L. T. Rep. N. S. 19; 19 W. R. 653; Darby & Bos. St. Limit. 233, 2nd edit.

and *cestui que trust*, and 37 & 38 Vict. c. 57, s. 10, applies to actions to recover the money out of the land charged.(a)

Should a testator have charged his lands by his will with the payment of his debts, it would seem this extends the claim of his creditors against the *land* to twelve years.(b)

By the Trustee Act, 1888, it is enacted that in any action or other proceeding against a trustee or any person claiming through him, except (1) where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or (2) is to recover trust property or the proceeds thereof still retained by him, or previously received and converted to his use, the following provisions are to apply: (i.) all rights and privileges conferred by any statute of limitations are to be enjoyed in like manner and to the like extent as if the trustee or person claiming through him had not been a trustee, &c. (ii.) If the action or proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee, &c., is to be at liberty to plead the lapse of time as a bar to such action or proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession (51 & 52 Vict. c. 59, s. 8).

"Trustee" in the Act includes an executor or administrator and a trustee whose trust arises by construction or implication of law, but not the official trustee of charitable funds (sect. 1).

The words "still retained" in the second exception, mean retained at the time the action is brought.(c)

The effect of sect. 8 is, with the exceptions mentioned therein, that a trustee who has committed a breach of trust is entitled to the protection of the several statutes of limitation as if actions for breaches of trust were enumerated in them.(d)

An action brought against a trustee to make good a loss occasioned by a breach of trust, not fraudulent, and not merely to recover a legacy, is "one to which no statute of limitations applies" within the Act.(e)

(a) Lewin, *Trusts*, 1008, 9th edit.; Darby & Bos. *St. Limit.* 429, 2nd edit.; *Hughes v. Coles*, sup., p. 392; see also *Re Davis*; *Evans v. Moore*, (1891) 3 Ch. 119; 65 L. T. Rep. N. S. 128; 39 W. R. 627, C. A.

(b) *Re Stephens*; *Warburton v. Stephens*, 43 Ch. Div. 39; 61 L. T. Rep. N. S. 609; see, however, *Barnes v. Glenton*, (1899) 1 Q. B. 885; 68 L. J. 502, Q. B.; 80 L. T. Rep. N. S. 607, C. A.

(c) *Thorne v. Heard*, (1895) A. C. 495; 64 L. J. 652, Ch.; 73 L. T. Rep. N. S. 291; 44 W. R. 155.

(d) *How v. Lord Winterton*, (1896) 2 Ch. 626; 75 L. T. Rep. N. S. 40; 65 L. J. 832, Ch.; 45 W. R. 103.

(e) *Re Swain*; *Swain v. Bringman*, (1891) 3 Ch. 233; 61 L. J. 20, Ch.; 65 L. T. Rep. N. S. 296.

whereas an action to recover a legacy from an executor is within 37 & 38 Vict. c. 57, s. 8, unless the legacy is vested in him upon an express trust, for if the executor is a mere constructive trustee he may plead the statute as a bar.(a) But in cases of fraud time is no bar even in the case of a constructive trust.(b) It must also be remembered that a legacy charged upon land comes within sect. 10 of 37 & 38 Vict. c. 57, already considered.

Extinguishment of Title.

By 3 & 4 Will. 4, c. 27, s. 34, it is provided that at the determination of the period limited by the Act to any person for making an entry or distress or bringing an action or suit, the *right and title* of such person to the *land, rent, or advowson* for the recovery whereof such entry, distress, action, or suit might have been made or brought within such period shall be *extinguished*.

And it has been held that when a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired under the statute a good holding title can restore the old title.(c)

This ~~sect.~~ applies as between mortgagor and mortgagee when the latter has been in possession for more than the statutory period without acknowledgment of the mortgagor's title in the meantime, and is not revived by an acknowledgment after that period.(d)

It also applies as between a mortgagee and a mortgagor when the mortgagor has been in possession for a like period when there ~~has~~ been no part payment of principal, or any interest, and no acknowledgment in the meantime.(e)

Title by Possession under the Land Transfer Acts.

The Land Transfer Act of 1897 (60 & 61 Vict. c. 65) contains an important exception regarding land registered under the Land Transfer Acts as to acquiring a title by possession. Sect. 12 enacts that a title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land. Provided that where a person would, but for the provisions of the Land Transfer Act, 1875, or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register, and the court may, subject to any estates or rights acquired by registration for value, order accordingly.

(a) *Re Davis*; *Evans v. Moore*, (1891) 3 Ch. 119; 65 L. T. Rep. N. S. 128; 39 W. R. 627, C. A.

(b) *Rolfe v. Gregory*, 12 L. T. Rep. N. S. 162; 51 and 52 Vict. c. 59, s. 8.

(c) *Sanders v. Sanders*, 19 Ch. Div. 373, 379; 51 L. J. 276, Ch.; 45 L. T. Rep. N. S. 637; 30 W. R. 280, C. A.; *Tichbourne v. Weir*, 67 L. T. Rep. N. S. 735, C. A.

(d) *Re Alison*; *Johnson v. Mounsey*, 11 Ch. Div. 284; 40 L. T. Rep. N. S. 234; 27 W. R. 537, C. A.

(e) *Kibble v. Fairthorne*, (1895) 1 Ch. 219; 64 L. J. 184, Ch.; 71 L. T. Rep. N. S. 755; 43 W. R. 327.

And this section is not to prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land when the registration of such first proprietor took place.^(a)

The Land Transfer Act of 1875 also contained a clause against the acquisition of a title by adverse possession (sect. 21); but this section is now repealed by the Act of 1897, sched. 1.

Period on an Intestacy.

By 23 & 24 Vict. c. 38, an action, &c., to recover the *personal* estate or share thereof of a deceased intestate must be brought against the legal personal representative within *twenty* years next after a present right to receive the same accrued to a person capable of giving a discharge for or release of the same, or after part payment thereof or of some interest thereon, or a written acknowledgment of his right thereto given by the person accountable for the same or his agent to the person entitled thereto or his agent (sect. 13). This section is retrospective.^(b) Leaseholds for years are within the Act.^(c) As to the time within which a legacy must be recovered, see *ante*, p. 390.

By 3 & 4 Will. 4, c. 27, s. 6, an administrator is to be deemed to claim as if there had been no interval of time between the death and the grant of letters of administration.

Prescription.

It yet remains to notice prescriptive claims, and to state the effect of 2 & 3 Will. 4, c. 71, thereon.

Commons.—Sect. 1 enacts that no claim which may be made at the common law, by custom, prescription, or grant to any right of common or other profit to be taken and enjoyed from or upon any land of the king, or ecclesiastical or lay person, except tithes, rent, and services (and save as further excepted) is, where such right, &c., has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, to be defeated by showing only that such right, &c., was first taken or enjoyed at any time prior to such period of thirty years. But such claim may be 'defeated in any other way in which it was defeasible at the passing of the Act. And where there has been an enjoyment as aforesaid for sixty years, the right is to be absolute and indefeasible, unless it appears that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (sect. 1).

Way or Water.—By sect. 2 similar provision is made with regard to a claim to any way or other easement, or to any watercourse or the use of any water, to be enjoyed upon, over, or from any land or water, which

(a) See remarks on this section, *post*, tit. "Land Transfer Acts and Rules."

(b) *Willis v. How*, 50 L. J. 4, Ch.; 43 L. T. Rep. N. S. 375; 29 W. R. 70.

(c) *Re Lacy*, 68 L. J. 488, Ch.; 80 L. T. Rep. N. S. 706; (1899) 2 Ch. 149.

has been actually enjoyed, &c., without interruption for the full period of twenty years, &c., and the way, &c., becomes indefeasible after forty years, with like exceptions.

The claim to a right of common may be defeated by showing that the right was first enjoyed at a time when it could not have originated legally.(a)

The right of way or water must be as of right and not by stealth or with occasional permission.(b)

A right of way must be uninterrupted, and not used at long intervals during the twenty years, or it will not establish the right.(c) And see also *ante*, pp. 89, 93.

Light.—By sect. 3, where the access and use of light to and for any dwelling-house, workshop, or other building has been actually enjoyed therewith for the full period of twenty years without interruption, the right is to be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

In order to establish the right there must, it is conceived, be some building in respect of which it is claimed(d) of a like character with a "dwelling-house or workshop" used in the above section; therefore a permanent structure used for storing timber, consisting of upright baulks of timber fixed on stone bases, with cross beams and diagonal iron braces, and several floors with open ends, was held by Chitty, J., not to be a structure within the Act;(e) however, on appeal the point was left open.(f) But in a recent case it was held that a greenhouse in a garden a short distance from the house was a "building" within sect. 3.(g)

The words "actually engaged" are satisfied where the house exists with ordinary windows through which light and air have passed, although unoccupied.(h)

The right to light is not affected by an alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through the old apertures into the old building.(i)

(a) *Mill v. New Forest Commissioners*, 18 C. B. 60; 25 L. J. 212, C. P.

(b) *Bright v. Walker*, 1 C. M. & R. 211, 219.

(c) *Hollins v. Verney*, 13 Q. B. Div. 306; 33 W. R. 5; 53 L. J. 430, Q. B.

(d) See sect. 3; *Scott v. Pape*, 31 Ch. Div. 554; 55 L. J. 426, Ch.; 54 L. T. Rep. N. S. 399; 34 W. R. 465, C. A.

(e) *Harris v. De Pinna*, 33 Ch. Div. 238; 54 L. T. Rep. N. S. 38.

(f) *Harris v. De Pinna*, 33 Ch. Div. 256.

(g) *Clifford v. Holt*, (1899) 1 Ch. 698; 68 L. J. 332, Ch.; 80 L. T. Rep. N. S. 48; and see *Scott v. Pape*, *sup.*

(h) *Courtauld v. Legh*, L. R. 4 Ex. 126; 38 L. J. 45, Ex.; 17 W. R. 466.

(i) *Scott v. Pape*, *sup.*; and see *Tapling v. Jones*, 11 H. L. Cas. 290; 12 L. T. Rep. N. S. 555.

A right to light may be acquired by enjoyment for the statutory period against a statutory company or other servient owner incapable of granting it.(a)

It will be noticed in sect. 3 of the Act the words by a person "claiming right thereto" are not inserted, as they are in sects. 1 and 2. Therefore an actual enjoyment of lights for twenty years, even under a permission verbally asked for by the occupier of a house and given by a person having the right to obstruct, is sufficient under this section.(b)

A right to the access of light to a house cannot be acquired under sect. 3 by the lapse of time during the unity of the ownership of the dominant and servient tenements, for during such period of unity of occupation the running of the twenty years is suspended.(c)

There appears to be no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than forty-five degrees from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case.(d)

Crown lands are expressly mentioned in sects. 1 and 2 of the Act, but sect. 3 does not mention the crown, therefore no right to light can be acquired, however long the period of enjoyment, over crown lands.(e)

By sect. 4 no act is to be deemed an interruption unless it is acquiesced in for one year after the party interrupted had notice thereof and of the person making or authorising the same to be made. And each of the respective periods of years mentioned in the Act is to be the period next before some suit or action wherein the claim is brought into question.(f)

By sect. 6 no presumption is to be allowed in support of any claim upon proof of the exercise or enjoyment of the right claimed for any less period than that mentioned in the Act in each case.

The question of the discontinuance or abandonment of a prescriptive right is one of intention to be decided upon the facts of each particular case. A mere suspension of the exercise of the right is not sufficient to prove conclusively the intention.(g)

The time during which any person, otherwise capable of resisting the claim, is an infant, idiot, *non compos mentis*, *feme covert*,(h) or tenant for

(a) *Jordeson v. Sutton, &c., Gas Company*, 67 L. J. 666, Ch.; 68 *Id.* 457; (1899) 2 Ch. 217.

(b) *Mayor, &c., of London v. Pewterers' Company*, 2 M. & Rob. 409.

(c) *Ladyman v. Grave*, 6 Ch. App. 763; 25 L. T. Rep. N. S. 52; 19 W. R. 863.

(d) *City of London Brewery Company v. Tennant*, 9 Ch. App. 212; 43 L. J. 458, Ch.; *Parker v. First Avenue Hotel Company*, 24 Ch. Div. 282; 49 L. T. Rep. N. S. 318; 32 W. R. 105, C. A.

(e) *Perry v. Eames*, (1891) 1 Ch. 658; 60 L. J. 345, Ch.; *Wheaton v. Maple*, (1893) 3 Ch. 48; 62 L. J. 963, Ch.

(f) See hereon *Flight v. Thomas*, 11 Ad. & E. 688; 8 Cl. & F. 231; *Seddon v. Bolton Bank*, 19 Ch. Div. 462; 51 L. J. 542, Ch.

(g) *Crossley v. Lightowler*, L. R. 3 Eq. 279; 2 Ch. App. 478; 15 W. R. 801; *Carr v. Foster*, 3 Q. B. 581.

(h) As to a *feme covert*, see ante, p. 388.

life, or during which any action or suit has been pending, and which has been diligently prosecuted, until abated by death of any of the parties, is to be excluded from the above periods, except where the right is declared absolute and indefeasible (sect. 7). And in the case of ways and watercourses where the servient tenement is held for life or years exceeding three years, the time of enjoyment of the way or watercourse during such term is to be excluded from the computation of the period of forty years if the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof (sect. 8).

CHAPTER X.

SETTLEMENTS.

A SETTLEMENT made upon marriage may be either of real or personal estate. The property settled may be that of either the husband or the wife, or of both parties. A settlement may be made by an instrument *inter vivos* or by will; also by Act of Parliament.(a) Settlements by will we shall treat of, not only in the present chapter, but also in the next following chapter. Settlements by Act of Parliament are not within the scope of this work.

The Statute of Frauds (29 Car. 2, c. 3), s. 4, requires (*inter alia*) all agreements made upon consideration of marriage to be in writing, signed by the party to be charged therewith or his lawful agent, before any action can be brought thereon.

The authority of the agent may be evidenced by parol.(b)

The Statute 29 Car. 2, c. 3, also requires all declarations of trusts of any lands or tenements to be manifested in writing, signed by the party declaring such trusts, otherwise they are to be void (sect. 7). Trusts arising or resulting by implication or construction of law, or extinguished by act of law, are, however, excepted (sect. 8). And declarations of trusts of money or chattels personal need not be so evidenced; but it is otherwise as to chattels real.(c) And copyholds are within the section.(d)

Marriage Articles.

A settlement is sometimes preceded by an agreement for a settlement, termed "articles for a settlement." Marriage articles, like an agreement for the sale of land, may be established through the medium of letters, provided they contain all the terms,(e) and show that the marriage is the consideration.(f)

(a) See Vaizey on Settl. 6; 6 Byth. & Jarm. Conv. 126, 4th edit.

(b) *Coles v. Trecothick*, 9 Ves. 250; *Heard v. Pilley*, 4 Ch. App. 548; *et ante*, p. 59.

(c) *Forster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 105.

(d) Lewin, Trusts, 53, 10th edit.; *Withers v. Withers*, Amb. 151.

(e) *Randall v. Morgan*, 12 Ves. 67; *Coverdale v. Eastwood*, L. R. 15 Eq. 121; 42 L. J. 118, Ch.; *Viret v. Viret*, 17 Ch. Div. 365, note; 50 L. J. 69, Ch.

(f) *Vincent v. Vincent*, 55 L. T. Rep. N. S. 181; 56 *Id.*, 243; 35 W. R. 7, C. A.

Marriage is a valuable consideration, and a settlement made previously to, and in consideration of, marriage in favour of husband and wife and their issue, is good not only between the parties, but also against creditors, excluding the operation of 13 Eliz. c. 5 (which makes all conveyances, &c., of lands or chattels to defeat creditors void); and also against purchasers for value, excluding the operation of 27 Eliz. c. 4 (which makes conveyances with intent to defeat purchasers void),^(a) even before the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21); of these statutes, however, we shall speak fully hereafter. And further, a settlement made after marriage, if in pursuance of written articles entered into before marriage, is as good and binding as a settlement made before marriage.^(b) If, however, the marriage consideration is tainted with fraud, of which the wife is aware, it will not support a settlement as against creditors.^(c)

In order that the court may compel the performance of marriage articles they should, as a rule, be in writing, or there must be a part performance; and marriage alone is not such a part performance; the part performance must come from the person who seeks performance, and must show that such person's position is altered by acts done on the faith of the contract.^(d)

Where there are articles for a settlement before marriage and a settlement after marriage, the articles are the binding instrument, and if the articles and the settlement give different estates and interests, the settlement will be reformed as between the parties and their representatives.^(e) But if both the settlement and the articles are before marriage, and they vary in their terms, the settlement will in general be considered the binding instrument.^(f)

Unless, therefore, there be sufficient reason for resorting to articles instead of at once executing a settlement, it is advisable to have a formal settlement prepared in the first instance. Where it is thought advisable to have articles, the form of an actual settlement should, if circumstances will admit, as far as possible be pursued, an agreement to convey or assign being substituted for the actual conveyance or assignment, and the uses, trusts, powers, &c., should be set out at length so as to avoid letting in the principle of construction applicable to executory trusts.^(g)

The Settlement.—The main object of a settlement now is, by vesting property in trustees, to make due provision for the mode and order in

(a) See *Kirk v. Clarke*, Prec. Ch. 276; *Twynes' Case*, Sm. L. C. vol. 1, and cases there cited.

(b) *Brunsdon v. Stratton*, Prec. Ch. 520; *Dundas v. Dutens*, 2 Cox, 235; *Twynes Case*, sup.

(c) *Columbine v. Penhall*, 1 Sm. & G. 256; 1 W. R. 272; *Re Pennington*, 59 L. T. Rep. N. S. 774; W. N. (1888) 205.

(d) *Caton v. Caton*, 35 L. J. 292, Ch.; 36 *Id.*, 886; L. R. 2 Ho. Lds. 127.

(e) *Legg v. Goldwire*, 1 L. C. Eq. 17, 6th edit.; 2 *Id.*, 770, 7th edit.; *Bold v. Hutchison*, 5 De. G. M. & G. 558, 568; but see *Mignon v. Parry*, 7 L. T. Rep. N. S. 88; 31 L. J. 819, Ch.

(f) *Legg v. Goldwire*, sup.

(g) See 3 David Conv. 662, pt. 1, 3rd edit.

which it is to be enjoyed (1) by the husband and the wife; and (2) by the issue of the marriage. Prior to the Settled Land Act, 1882, another great object was to keep real estates in the settlor's family. And before the Married Women's Property Act, 1882, when the property belonged to the wife, a settlement thereof was made to protect her against her husband and his creditors. The latter statute, however, while securing to the wife her own property, present or future (*ante*, p. 15; *et post*), makes no provision against the husband's influence, puts no restraint against anticipation, and makes no provision for the issue of the marriage, all which events must still be provided for by settlement.

A marriage settlement can no longer be relied upon for the purpose of keeping an estate in the settlor's family, as the Settled Land Act, 1882, and Amendment Acts have, as will be shown fully in subsequent pages, given the tenant for life of the settled lands full power to sell, &c., the same, subject as in the Act is specified.

Preparation and Cost of the Settlement.—A marriage settlement is usually prepared by the intended wife's solicitor, which was, however, usually paid for by the intended husband.(a) If, however, the settled property belongs to a ward of court, the costs of all parties are usually ordered to be paid out of the *corpus* of the property.(b) And since 1882 the husband's liability for his wife's antenuptial debts is restricted to the extent of the property belonging to the wife which he acquires or becomes entitled to through her.(c)

Rights of Husband and Wife.

Although it has already (*ante*, pp. 14 to 21) been stated to what extent a married woman has power to convey her estate and interest in property, it is necessary here to state what are the rights of husband and wife respectively as to contracts and property in respect to each other.

Contracts between Husband and Wife.—Contracts entered into between husband and wife before marriage are generally extinguished by the marriage; unless enforcing them would be furthering the manifest interest of the parties, as in the case of marriage articles. Their contracts after marriage are, under certain circumstances, enforced in equity, as if the wife raises money out of her estate to answer the husband's necessities, she is entitled to be reimbursed out of his estate.(d) And by 45 & 46 Vict. c. 75 (amended by 56 & 57 Vict. c. 63), a married woman may contract in respect of her separate property as if *sole* (sect. 1, subsect. 2); and whether married before or after the Act may alone sue all persons, including her husband (except as therein excepted), for the protection of such property (sect. 12; and see *ante*, pp. 13 to 15). And since this Act, the husband may sue his wife and charge her separate estate for money lent by him to her, or paid by him for her *after* the

(a) *Helps v. Clayton*, 11 L. T. Rep. N. S. 476; 34 L. J. 1, C. P.

(b) *De Stackpole v. De Stackpole*, 37 Ch. Div. 139; 58 L. T. Rep. N. S. 382.

(c) 45 & 46 Vict. c. 75, s. 14.

(d) *Story's Eq.*, sects. 1370 to 1373.

marriage, at her request, but not for money so lent or paid *before* their marriage.(a) And any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any *trade or business* carried on by him, or otherwise, is to be treated as assets of her husband's estate in case of his bankruptcy, but the wife may claim as a creditor after other creditors are satisfied (45 & 46 Vict. c. 75, s. 3). But where the money is lent to the husband for purposes unconnected with his trade or business the wife will not be postponed to other creditors.(b)

A married woman may contract to live apart from her husband, and the court will decree specific performance of such a contract, if it be founded on a sufficient consideration,(c) as will be detailed more fully subsequently.

Their Rights as to Property.—If the marriage took place before the 9th August, 1870, and there be no settlement or agreement for a settlement of the wife's freehold lands, the husband is entitled to the rents and profits thereof and acquires a freehold estate therein during the coverture; and may grant leases thereof for twenty-one years, which will bind the wife and her representatives. But subject to this he cannot convey or charge such lands for any longer period than while his own interest continues.(d)

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), however, it is enacted that where any freehold or copyhold property shall descend upon any woman married *after* the passing of the Act (9th August, 1870) as heiress or co-heiress of an intestate, the rents and profits thereof, subject to any settlement affecting them, shall belong to her for her separate use, and her receipts alone shall be a good discharge for the same (sect. 8).

This section is repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), but such repeal is not to affect any right acquired thereunder while in force (sect. 22).

And sect. 1 of the Act of 1882 provides that a married woman shall be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (sub-sect. 1). And by sect. 2, every woman who marries after the commencement of the Act (1st January, 1883) shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all *real and personal* property which shall belong to her at the time of marriage, or is acquired by her after marriage, including any wages, &c. And by sect. 5 every woman married *before* the commencement of the Act shall be entitled to have and to hold, and to dispose of, &c., as her separate

(a) *Butler v. Butler*, 14 Q. B. Div. 831; 16 *Id.*, 374; 55 L. J. 55, Q. B.; 54 L. T. Rep. N. S. 649; 34 W. R. 132.

(b) *Re Tidswell*, 57 L. T. Rep. N. S. 416; 56 L. J. 548, Q. B.; *Re Clark*; *Ex parte Schulze*, 67 L. J. 759, Q. B.; 78 L. T. Rep. N. S. 735; (1898) 2 Q. B. 330.

(c) *Resant v. Wood*, 12 Ch. Div. 605; *Hart v. Hart*, 18 *Id.*, 670; *McGregor v. McGregor*, 21 Q. B. Div. 424; 57 L. J. 591, Q. B.; 37 W. R. 45, C. A.

(d) See Will. R. P. 225, 231, 13th edit.; *et ante*, pp. 15 n, 284.

property all real and personal property her *title* to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* the commencement of the Act, including wages, &c.

It is clear, then, that any property coming within either of the above sections belongs to the wife as her separate property, and requires no settlement or agreement for a settlement merely to protect her against her husband or his creditors.

If no provision be made for the husband in the wife's real estate of inheritance, he is, notwithstanding the above sections, entitled, if the requisites thereto exist, to an estate by the curtesy in such estate, if undisposed of at her death.(a)

On the construction of sect. 5 of the Act of 1882, it has been held that if a woman married *before* the commencement of the Act, has also *before* the commencement of the Act acquired a *title*, whether vested or contingent, in reversion or remainder to any property, such property is not made her separate property by such section, though the property falls into possession after the Act.(b) In regard to such property, therefore, the wife must be protected by settlement.

As to the wife's legal chattels real in possession, at common law the husband became possessed of these by marriage in her right, and he was entitled not only to the profits of them, but he might also dispose of them as he pleased during the coverture, and they were liable for his debts; and if he survived her they were absolutely his. But he could not bequeath them by will; and if he made no disposition of them in his lifetime, and she survived him, they went to her and not to his executors.(c)

And at common law the husband could, during coverture, without his wife's concurrence, assign her reversionary leaseholds for years, so as to deprive her of her equity therein, unless the interest was of such a nature that it could not by possibility vest in the wife in possession during coverture.(d)

By the Married Women's Property Act, 1870, however, it is provided that where any woman married *after* the passing of the Act, shall *during* marriage become entitled to any personal property as next of kin, or one of the next of kin of an intestate, or to a sum of money not exceeding 200*l.* under a deed or will, such property shall, subject to any settlement affecting the same, belong to her for her separate use, and her receipts alone shall be a good discharge for the same (sect. 7). This section is repealed by the Married Women's Property Act, 1882, but such repeal is not to affect any right acquired thereunder while in force (sect. 22).

And as to a woman married after the commencement of the Act of

(a) *Hope v. Hope*, (1892) 2 Ch. 336; 61 L. J. 441, Ch.; 66 L. T. Rep. N. S. 522; 40 W. R. 522.

(b) *Reid v. Reid*, 31 Ch. Div. 402; 55 L. J. 294, Ch.; 54 L. T. Rep. N. S. 100; 34 W. R. 332, C. A.; *Re Cuno*, 43 Ch. Div. 12; 62 L. T. Rep. N. S. 15.

(c) Co. Lit. 46 b, 351 a; 2 Bl. Com. 434; Will. R. P. 408, 409, 13th edit.; *et ante*, p. 20.

(d) Story's Eq., sects. 1410, 1413; *Duberley v. Day*, 16 Beav. 33; Lewin, Trusts, 911, 10th edit.

1882, she is entitled to have and to hold her chattels real as her separate property; and if married before such period, if her title accrues afterwards, she is likewise so entitled to them, as in the case of real estate,(a) already stated.

So at common law all personal chattels of the wife, the property in which passes by mere delivery of possession, became the property of the husband on the marriage,(b) in the absence of stipulation to the contrary.

Paraphernalia.—However, irrespective of the above Acts, there was always a partial exception to the above rule in regard to the wife's *paraphernalia*, that is, her personal apparel and ornaments suitable to her rank. For as to her *paraphernalia*, the husband may, in his lifetime, but not by his will, dispose thereof with the exception of necessary apparel. It is also, with like exception, liable for his debts. The wife, cannot, however, dispose of her *paraphernalia* by gift or by will during the husband's lifetime; for her absolute right in them does not arise till she becomes a widow.(c)

The Married Women's Property Act, 1882, does not affect the law as to gifts of *paraphernalia*.(d)

As to the wife's *choses in action*, which term includes debts, money on deposit, legacies, residuary personal estate, trust funds, stock, and other personal property recoverable by action, these at common law did not belong to the husband until he had reduced them into possession. And if he died before this was done they survived to the wife. So if she died before her *choses in action* had been reduced into possession by her husband they formed part of her estate, to which, however, the husband was entitled to administer, and so become the owner thereof, subject to the payment of her debts.(e)

If the *chose in action* be legal, as an ordinary debt due to the wife, the husband had a right to sue for it at law in his own and his wife's name, and in some cases in his own name alone.(f)

Equity to a Settlement.—But as to the wife's equitable *choses in action*, as legacies, or other property, real or personal, vested in trustees, which can be obtained only by the aid of a court of equity, the rule was that the court would not assist the husband to recover and receive the property without his settling a due proportion thereof upon his wife and children.(g)

(a) 45 & 46 Vict. c. 75, ss. 1, 2, 5; *et ante*, pp. 403, 404.

(b) 1 Rep. H. & W. 169; Lush, H. & W. 44, 2nd edit.; Macqueen, H. & W. 17, 3rd edit.

(c) Story's Eq., sects. 1376, 1377; Snell's Eq., 372, 6th edit.; Macqueen H. & W. 112, 3rd edit.

(d) *Tasker v. Tasker*, (1895) P. 1; 64 L. J. 36, Pr. & D.; 71 L. T. Rep. N. S. 779; 43 W. R. 255.

(e) Macqueen H. & W. 31, *et seq.*, 3rd edit.; 2 St. Com. 282, *et seq.*, 10th edit.; Lush, H. & W. 50, 51, 2nd edit.

(f) See 1 Rep. H. & W. 213, 214.

(g) See *Lady Elibank v. Montolieu*, 1 L. C. Eq. 486, 6th edit.; Story's Eq., sect. 1405, *et seq.*

But the children had no independent equity of their own, their claim arising through the equity of the mother, which might be expressly waived by her, or lost by her dying without having asserted it.(a) It was enforced, not only against the husband, but out of the wife's immediate *choses in action* and immediate absolute equitable interest in chattels personal, also against his trustee in bankruptcy, and his assignees for payment of debts generally, and even against his specific assignees for value. However, as against the latter, as against the husband, the provision for the wife usually only commences from the death of the husband; while, as against the two former, it was ordered that the provision should commence immediately, because the husband is, in these cases, rendered incapable for a time, and perhaps for ever, of affording her a suitable support.(b)

The amount settled was usually half the fund where there was no prior settlement; but in case of the husband's bankruptcy three-fourths, or even the whole fund, was ordered to be settled.(c)

The wife might waive her equity to a settlement in open court, she not being an infant.(d) And as already shown under the provisions of the stat. 8 & 9 Vict. c. 106, s. 6, contingent, executory, or future interests in any tenements, may be disposed of by deed by a married woman, conformably to the provisions of 3 & 4 Will. 4, c. 74; and by 20 & 21 Vict. c. 57, future or reversionary interests in personal estate, as defined by the Act, may be disposed of by her in the manner prescribed by the 3 & 4 Will. 4, c. 74.(e) The wife's equity to a settlement does not attach to a reversionary interest while it remains reversionary.(f)

And in regard to married women who do not come within the provisions of the Married Women's Property Acts, the above rules of law and equity will still apply.(f)

The Married Women's Property Act, 1870, however, as already seen, gave the wife's personal property which she took as next of kin, or money under a deed or will not exceeding 200*l.*, for her separate use (sect. 7).

And by the Act of 1882, sects. 1 (1), 2, and 5, a married woman coming within its provisions is entitled to have and to hold as her separate property and to dispose of all her property, real or personal, to the effect already (*ante*, p. 403) stated; so that she now becomes entitled to the whole property or fund, and not merely to an equity.

And by the combined effect of sect. 1 of the Act of 1870, and sects. 2 and 5 of the Act of 1882, a married woman, whatever may be the date of her marriage, is entitled for her separate use to any wages, or

(a) Story's Eq., sect. 1417; *De La Garde v. Lempriere*, 6 Beav. 344.

(b) Story's Eq., sects. 1411, 1413, 1421.

(c) *Spirett v. Willows*, 1 Ch. App. 520; *Id.*, 4 Ch. App. 407; *Taunton v. Morris*, 8 Ch. Div. 453; 11 Ch. Div. 779, C. A.

(d) Story's Eq., sect. 1418; *Shipway v. Ball*, 16 Ch. Div. 376; 50 L. J. 263, Ch.

(e) See *ante*, p. 19; see also *Tennant v. Welch*, 37 Ch. Div. 622, 630; *Roberts v. Cooper*, *infra*.

(f) See *Roberts v. Cooper*, (1891) 2 Ch. 335; 60 L. J. 377, Ch.; 64 L. T. Rep. N. S. 227, 584; *Re Howard*, (1895) 13 R. 233.

earnings, acquired or gained by her after the 9th August, 1870, in any employment or trade in which she is engaged, or carries on separately from her husband, and also to any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill.

So by the Act of 1870, sect. 2, deposits in savings banks in the name of a married woman were to be deemed her separate property. And by the same Act a married woman might, on taking the steps in the Act mentioned, acquire a separate property in (1) any sum forming part of the public stocks and funds, not being less than 20*l.* (sect. 3); and (2) in any fully paid-up shares, or debenture or debenture stock, or any stock to the holding of which no liability is attached, in any incorporated or joint-stock company (sect. 4); and (3) in the shares, debentures, &c., of any industrial and provident, friendly, benefit building, or loan society, duly registered, to the holding of which no liability is attached (sect. 5).

Sect. 10 of the Act enabled her to effect an insurance upon her own or her husband's life, for her separate use. And a policy of insurance effected by a husband on his own life and expressed on its face to be for the benefit of his wife, or his wife and children, was to be deemed to be for the separate use of the wife and children; and when the policy money became payable a trustee might be appointed by a judge of the Court of Chancery or of a county court, whose receipt was to be a good discharge.

For these advantages, however, the Act of 1870 imposed burdens upon the wife as to her debts, and any liability arising to the parish for the maintenance of her husband, and her children (sects. 12 to 14).

The Act of 1870, was, however, repealed^(a) by the Married Women's Property Act, 1882, save as to acts done, and rights acquired thereunder while in force.^(b)

And by the Act of 1882, sect. 6, all deposits in any post office or other savings bank, or other bank, all annuities granted by the commissioners for the reduction of the National Debt, or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England, or of any other bank which, on 1st January, 1883, were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building or loan society which, on that day, were standing in her name, are to be deemed, unless the contrary be shown, to be her separate property; and she may accordingly receive or transfer the same, and receive the dividends, interest, and profits thereof without the concurrence of her husband.

By sect. 7 all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are

(a) Sect. 12 was, however, repealed in 1874 by 37 & 38 Vict. c. 50.

(b) *Re Adams Policy Trusts*, 23 Ch. Div. 525; 48 L. T. Rep. N. S. 727; *Re Turnbull*, 77 L. T. Rep. N. S. 47; 66 L. J. 719, Ch.; (1897) 2 Ch., 415.

mentioned in sect. 6, and all shares, stock, &c., in any such corporation, &c., as aforesaid, which, on or after 1st January, 1883, are allotted to or placed, registered, or transferred in or into, or made to stand in the sole name of a married woman, are to be deemed, until the contrary be shown, her separate property. But a corporation or joint-stock company is not to be required or authorised to admit any married woman to be a holder of any shares or stock therein to which any liability is incident contrary to the provisions of any statute, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

The provisions above mentioned are to extend and apply, so far as relates to the right, title, or interest of the married woman, to any of the particulars aforesaid which, on or after the 1st January, 1883, are standing in, or shall be allotted to, &c., or transferred to any married woman jointly with any persons or person other than her husband (sect. 8); and it is not necessary for her husband, in respect of her interest, to join in the transfer of such annuity, deposit, stock, &c., as aforesaid, standing in her name alone, or jointly with another, or others, not being her husband (sect. 9).

If she makes any such investment as above with her husband's moneys without his consent, he may apply to the court for relief; and if he joins in the fraud his creditors are entitled to relief (sect. 10).

By sect. 11 a married woman may effect a policy upon her own life or the life of her husband for her separate use. And a policy of assurance effected by a man on his own life and expressed to be for the benefit of his wife, or his children, or both, or by a woman on her own life and expressed to be for the benefit of her husband or her children, or both, creates a trust in favour of the objects therein named, and the moneys payable under the policy will not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts; provided this is not done to defraud creditors.

The insured may, by the policy or a signed memorandum, appoint trustees of the insurance moneys, and make provision for the investment thereof; and in default of such appointment the policy vests in the insured and his or her legal personal representatives in trust for the purposes aforesaid. And if at the death of the insured or subsequently there is no trustee, a trustee or new trustee may be appointed by the court. The receipt of such trustee, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the insured's legal personal representative is to be a good discharge for the insurance money (sect. 11).

For these advantages a woman after her marriage is to continue liable to the extent of her separate property for her debts, contracts, or wrongs arising or committed before her marriage, including sums for which she may be liable as a contributory under the Joint-Stock Companies Acts. And as between her and her husband, in the absence of stipulation to the contrary, her separate property is to be primarily liable for such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof (sect. 13).

A husband is only liable for the debts contracted and torts committed by his wife before marriage to the extent of the property belonging to her which he has acquired or become entitled to from or through her, after deducting therefrom payments, &c., made by him in respect of such debts, &c. (sect. 14 ; see also sects. 20 and 21).

And by sect. 19 nothing in the Act is to affect a settlement or agreement for a settlement made or to be made before or after marriage, of her property, or to render inoperative any restriction against anticipation as to the enjoyment of her property or the income under any instrument. But no such restraint in a settlement or agreement for a settlement of a woman's own property to be made by herself is to be valid against debts contracted by her before marriage,(a) and no settlement or agreement for a settlement is to have any greater force against her creditors than a like settlement or agreement for a settlement made by a man would have against his creditors (sect. 19); which will be stated *post*.

We have shown that the Married Women's Property Act, 1882, has not deprived a husband of his right to curtesy in his wife's real estate of inheritance, if the requisites to curtesy exist.(b) It has also been decided that this Act does not affect the right of the husband to succeed, on the death of the wife, to her undisposed of separate personal estate.(c)

It has also been held, since the Married Women's Property Act, 1882, that a husband, married before the Act, need not take out letters of administration to his deceased wife to complete his title to her leaseholds, to which he succeeds *jure mariti*.(d) But they are subject to the payment of her debts.(e)

It has also been held that the above Act does not affect the law as to gifts of paraphernalia.(f)

Trust for the Separate Use of a Married Woman.

Independently of the Married Women's Property Acts, equity has long recognised the right of a married woman to the separate and independent enjoyment of property, real or personal, provided it be clear from the instrument under which this right arises that the husband is to be excluded from any enjoyment therein.(g) The words generally used are for her "sole and *separate* use." But if the gift be for "her own sole use

(a) See hereon *Jay v. Robinson*, 25 Q. B. Div. 467 ; 59 L. J. 367, Q. B. ; 62 L. T. Rep. N. S. 174 ; *et ante*, p. 16.

(b) See *ante*, p. 404.

(c) *Re Lambert* ; *Stanton v. Lambert*, 39 Ch. Div. 626 ; 57 L. J. 927, Ch. ; 59 L. T. Rep. N. S. 429.

(d) *Re Bellamy* ; *Elder v. Pearson*, 25 Ch. Div. 620 ; 49 L. T. Rep. N. S. 708 ; 53 L. J. 174, Ch. ; 32 W. R. 358.

(e) *Surman v. Wharton*, (1891) 1 Q. B. 491 ; 60 L. J. 233, Q. B. ; 64 L. T. Rep. N. S. 866 ; 39 W. R. 416.

(f) *Ante*, p. 405.

(g) *Lewin on Trusts*, 754, 8th edit. ; 921, 922, 10th edit. ; *Tullet v. Armstrong*, 1 Beav. 1.

and benefit absolutely," it will create a trust for her separate use if trustees are interposed and the context shows that this was intended.(a) But it seems the word "sole" used in a will will not be held to mean "separate" unless there be something in the context to show such an intention.(b)

The decisions on this point are, however, chiefly of importance in regard to married women who do not come within the provisions of the Married Women's Property Act, 1882, already(c) considered.

The powers of disposition of a married woman over property, real or personal, settled to her separate use, and the effect of the restraint against anticipation have already(c) been stated, also her powers of disposition over property not so settled, or not her separate property under the Married Women's Property Acts.

Gifts to Husband and Wife.—On a gift to husband and wife and a third person, they, as a rule, hold the property as joint tenants, husband and wife taking one moiety between them, and the third person the other moiety. The wife will, however, since the Married Women's Property Act, 1882, take her share as her separate property.(d) But when the gift is by will, the intention of the testator may be looked at, and a slight difference in the words of the gift has been held sufficient to prevent the operation of the rule as to unity of husband and wife, who then will take separately.(e) And the rule as to the unity of husband and wife does not apply where the gift is made to them as a class.(f)

As to a gift by a husband to his wife, the evidence to establish such a gift must show some clear and distinct act by which a husband, married before 1883, has divested himself of the property and merely holds it as a trustee for his wife.(g) As where, according to a verbal agreement before marriage, the husband permitted his wife to retain in her maiden name a sum of money standing to her credit on deposit at a bank, and on which she received the interest for some years and ultimately drew it out, and it was held by the Court of Appeal that there had been a gift of the money by the husband to the wife after marriage, and that he had become a trustee of it for her, as her separate property.(h)

(a) *Re Tarsey*, L. R. 1 Eq. 561; 35 L. J. 452, Ch.; 14 W. R. 474; 14 L. T. Rep. N. S. 15; *Bland v. Dawes*, 17 Ch. Div. 794; 50 L. J. 252, Ch.; 43 L. T. Rep. N. S. 751; 29 W. R. 416.

(b) *Massy v. Rowen*, L. R. 4, H. L. Ca. 288; *Gilbert v. Lewis*, 1 De G. J. & S. 38; 7 L. T. Rep. N. S. 164; *Massey v. Parker*, 2 Myl. & K. 174.

(c) *Ante*, p. 15, *et seq.*

(d) *Re March*; *Mander v. Harris*, 27 Ch. Div. 166; 54 L. J. 143, Ch.; 51 L. T. Rep. N. S. 380; 32 W. R. 941; *Re Jupp*; *Jupp v. Buckwell*, 39 Ch. Div. 148; 57 L. J. 774, Ch.; 59 L. T. Rep. N. S. 129; 36 W. R. 712; *Thornley v. Thornley*, (1893) 2 Ch. 229; 62 L. J. 370, Ch.

(e) *Re Dixon*; *Byram v. Tull*, 42 Ch. Div. 306; 61 L. T. Rep. N. S. 718; 38 W. R. 91.

(f) *Re Gue*; *Smith v. Gue*, 61 L. J. 510, Ch.; 67 L. T. Rep. N. S. 823; W. N. (1892) 132.

(g) *Mews v. Mews*, 15 Beav. 529.

(h) *Ex parte Whitehead*, 14 Q. B. Div. 419; 54 L. J. 240, Q. B.; 52 L. T. Rep. N. S. 597; 36 W. R. 471.

And, as already shown, a married woman coming within the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), is capable of acquiring and holding any property as her separate property in the same manner as if she were a *feme sole*, without the intervention of a trustee (sect. 1).

Where a husband purchases stock in the joint names of himself and his wife, a gift to the wife may be presumed, subject to his right thereto if he survive his wife.(a) However, the question whether the purchase is to operate as a gift to the wife, if she survives, is one seemingly of intention.(b)

Settlements of Real Estate.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), and amending Acts, contain important provisions affecting the law and practice relating to marriage settlements, to which we shall have occasion to refer from time to time in this chapter.

Sect. 2 of the Act of 1882 enacts that any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or instruments made or passed before or after the commencement of this Act (1st January, 1883), under which any *land*, or any estate or interest in land, stands for the time being limited to, or in trust for, any persons by way of succession, is, for purposes of this Act, a settlement (sub-sect. 1).

And an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for purposes of this Act, an estate or interest coming to the settlor or heir under the settlement, and comprised in the subject of the settlement (sub-sect. 2).

And the Settled Land Act, 1890 (53 & 54 Vict. c. 69) further enacts that every instrument whereby a tenant for life, in consideration of marriage, or as part of a family arrangement (not being a security for payment of money advanced), makes an assignment of or creates a charge upon his estate under the settlement, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within sect. 50 of the Act of 1882. This section is to apply to a disposition before as well as after this Act, unless inconsistent with the nature or terms of the disposition (sect. 4).(c)

Land, and any estate or interest therein which is the subject of a settlement is, for purposes of the Acts, settled land. And the determination of the question whether land is settled land, for purposes of the Acts or not, is governed by the state of facts and the limitations of

(a) Lush, H. & W. 182, 2nd edit.; *Dummer v. Pitcher*, 2 M. & K. 262.

(b) *Marshal v. Crutwell*, L. R. 20 Eq. 328; *Re Young*; *Tyre v. Sullivan*, 28 Ch. Div. 705; 52 L. T. Rep. N. S. 754; 54 L. J. 1065, Ch.; 33 W. R. 729.

(c) See also the definition of "settlement" in the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 1; and see *post*, sub-tit. "Appointment of New Trustees."

the settlement at the time of the settlement taking effect (45 & 46 Vict. c. 38, s. 2, sub-ss. 3, 4; 53 & 54 Vict. c. 69, s. 3).

It will be noticed that sect. 2, sub-sect. 1, of the Act of 1882 only speaks of settlements of land, or any estate or interest in land. And by sub-sect. 10 of this section land includes incorporeal hereditaments, and an undivided share in land. But, as will be shown in subsequent pages, heirlooms may be dealt with under the Act (sect. 37).

It will be seen that by the Act of 1882 the settlement may consist of an "instrument or instruments." Therefore, where under a will a tenant for life had power to charge the settled lands and did so by marriage settlement, it was held that the will and the settlement together constituted "the settlement," within sect. 2 (1), (a) commonly called a compound settlement. And "Act of Parliament" in the Act includes a public as well as a private Act of Parliament. (b)

The same Act defines who is a tenant for life; and also specifies who are to have the powers of a tenant for life, which will be found fully detailed *ante*, pp. 286, 292.

It will be also advisable here to give the definition of a trustee within the Settled Land Acts.

Sect. 2, sub-sect. 8, of the Act of 1882, provides that the persons, if any, who are, for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to the exercise of such a power, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for such purposes trustees of the settlement (sub-sect. 8).

By the Act of 1890, where there are for the time being no such trustees as above, then, for the purposes of the Acts 1882 to 1890, (1) the persons (if any) who are under the settlement trustees, with power of or upon trust for sale of *other* land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent thereto; or, if there be no such persons, then (2) the persons (if any) who are under the settlement trustees with *future* power of sale or under a future trust for sale of the land to be sold, or with power of consent thereto, are to be trustees of the settlement (sect. 16).

Before this enactment it was held that a trustee with a power of sale to arise *in futuro*, was not within the Act of 1882. (c)

If, on investigating the title to the estate it is intended to settle, it turns out that the property is incumbered, some provision should be made for payment of the incumbrances, otherwise the incumbrancer

(a) *Re Tibbits*, (1897) 2 Ch. 149; 66 L. J. 660, Ch.; 77 L. T. Rep. N. S. 88; 46 W. R. 3; and see *Re Lord Monson's S. E.*, (1898) 1 Ch. 427; 67 L. J. 176, Ch.; 78 L. T. Rep. N. S. 225; *Re Mundy and Roper*, 79 L. T. Rep. N. S. 583; 68 L. J. 135, Ch.; (1899) 1 Ch. 275, C. A.

(b) *Re Chaytors' S. E. Act*, 25 Ch. Div. 651; 53 L. J. 312, Ch.; 50 L. T. Rep. N. S. 88; 32 W. R. 517; *Vine v. Raleigh*, (1896) 1 Ch. 37; 65 L. J. 103, Ch.

(c) *Wheelwright v. Walker*, 23 Ch. Div. 752, 761; 31 W. R. 363; 52 L. J. 274, Ch.; 48 L. T. Rep. N. S. 70, 682.

might enter into the receipt of the rents and profits, and thus defeat the object of the settlement.

Parts of a Strict Settlement.—If the property to be settled consist of large real estates belonging to the intended husband, no doubt they would be strictly settled. The various parts of such a settlement would be the following:—

1. The date, and parties, the intended husband of the first part, the intended wife of the second part, and the trustees of the settlement of the third part.

2. Any recitals that may be necessary follow the parties. Some conveyancers recite the agreement for the marriage; however, this may be dispensed with, and this fact be briefly stated in the *testatum*. The interest of the settlor in the property settled is also sometimes recited.

3. The *testatum* and *habendum* are next set out: The settlor conveys the estates to the trustees in fee to hold to the uses and trusts of the settlement.

4. These are (1) to the use of the intended husband until the marriage, and after the solemnisation thereof (2) to the use that, during the joint lives of husband and wife, she may receive a yearly rent-charge, without power of anticipation, for her pin money; and subject thereto, (3) to the use of the husband for life without impeachment of waste; and after his death, (4) to the use that the wife may receive a yearly rent-charge for her jointure; then, (5) to the use of the trustees for a term of one thousand years, to commence from the death of the husband, for raising portions for younger children; and subject thereto, (6) to the use of the first and other sons successively in tail male, with (7) remainder to the use of the settlor in fee.

But if it is so wished, after the limitation of the use to the first and other sons successively in tail male, a further use may be limited to them in tail; and, in default of such issue, to the use of the daughters as tenants in common in tail, with cross remainders between them; the ultimate remainder (as before) being to the use of the settlor in fee.

5. The trusts of the portions term are next declared.

6. The powers formerly inserted in settlements were (1) to distrain for the wife's jointure, and to demise the land for a term for the purpose of securing it; (2) a power for the tenant for life, and after his death, for the trustees, to lease the settled lands; (3) a power for the trustees to sell the settled lands and purchase other lands, &c.; (4) to exchange the settled lands for other lands, &c.; (5) to concur in making partition of undivided shares of the lands; (6) a power enabling the trustees to manage the settled property during minorities; (7) that the receipts of the trustees should be good discharges for the trust money; (8) a power for the settlor to jointure a future wife, and to raise portions for the children of that marriage; and (9) to appoint new trustees of the settlement. A trustees indemnity clause was added. We shall show subsequently that many of these clauses are now unnecessary.

7. It was also the practice to make the settlor enter into the usual covenants for title.(a)

We will now consider the foregoing clauses in detail, so far as they are important.

The Trustees.—It was formerly the practice in settlements of real estate to have several sets of trustees; one set for the powers of sale and exchange and for the general purposes of the settlement, and other sets for the jointure and portions terms. Before the 8 & 9 Vict. c. 106, s. 8, had enacted that a contingent remainder should be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of the preceding estate of freehold, it was usual to limit a freehold estate to trustees to preserve such remainders; and also to make them trustees of the powers of sale and exchange; and if any term of years had been limited to the same trustees, there was the risk of the term merging in the freehold; hence the trustees to preserve were different from the trustees of the term. And for the like reason it was considered that if two separate terms—the jointure term and the portions term—were limited to the same trustees there was a risk of the two terms coming together without any intervening estate, and thus causing a merger.(b) However, the Judicature Act, 1873, provides that there is not to be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged in equity.(c)

One set of trustees is now, therefore, generally considered sufficient. Some conveyancers, however, still advise the appointment of two separate sets of trustees, one set for the purposes of the Settled Land Acts, and of sect. 42 of the Conveyancing Act of 1881, and for any additional powers that may be given by the settlement, and another set for the portions term, so as to keep separate and distinct the interests of the settlor and the eldest son, on the one hand, and those of the younger children, on the other.(d)

It may also be advisable to appoint three general trustees so as to avoid any difficulty that might otherwise arise under the Trustee Act, 1893, s. 11, in case a trustee desires to be discharged from the trust; or under the Settled Land Act, 1882, s. 39, as to payment of capital trust money to not less than two trustees; or under sect. 45 of the same Act as to notice of sale, &c., as to which see *post*.

Uses and Trusts.—The first use usually is for the settlor in fee until the marriage is solemnised: And where this is the case with certain trusts over, and by reason of the affinity of the parties or otherwise no legal marriage takes place, the original trust only operates, and the property belongs to the settlor.(e) And if after a settlement is executed the

(a) See 3 David. Conv. 271 to 275, 634, pt. 1, 3rd edit.

(b) See 2 Prid. Conv. 344, n., 14th edit.; 6 Byth. & Jar. Conv. 383, 688, 4th edit.

(c) Sect. 25, sub-sect. 4; *Snow v. Boycott*, (1892) 3 Ch. 110; 61 L. J. 591, Ch.

(d) See 6 Byth. & Jar. Conv. 383, 688, 4th edit.; Wolst. Forms, 5th edit.

(e) *Pawson v. Brown*, 13 Ch. Div. 202; 49 L. J. 193, Ch.; 28 W. R. 652; 41 L. T. Rep. N. S. 339; *Neale v. Neale*, 79 L. T. Rep. N. S. 629; *Phillips v. Probyn* (1899), 1 Ch. 811; 80 L. T. Rep. N. S. 513.

marriage is broken off, it is open to the parties to revoke the settlement or to call upon the trustees to execute other deeds.(a) And the Court may in such an event declare that the marriage contract is rescinded, and order the settlement to be delivered up;(b) and if stock has been transferred to the trustees of the settlement, may also order a re-transfer thereof to the party entitled thereto.(c) But this will not be done if the settlement is so framed that it will apply to any marriage of the settlor, and not merely to the then intended marriage.(d)

The uses and trusts after the marriage are, first for the wife's pin money, which may be defined as a provision for the wife's dress, personal ornament, and pocket money. Consequently if husband and wife are living together the wife can only claim one year's arrears of pin money. And it seems the wife's personal representatives are not entitled to claim for any arrears.(e)

Formerly it was the practice to limit a term to trustees to secure the annuity for pin money, but it seems clear that a limitation to the use that the wife may receive an annuity charged upon the settled estates, is now sufficient for all purposes; and she will be entitled to the remedies for its recovery given by sect. 44 of the Conveyancing Act, 1881, as in the case of the wife's jointure,(f) as will be shown subsequently. The next use in due order is for the husband for life, but it is convenient to first briefly notice the wife's remaining interest under the settlement.

Jointure.—The acceptance by the wife of a competent jointure, whether legal or equitable, before marriage is a bar to her right to dower. However, with regard to women married after the 1st January, 1834, this doctrine is not of much moment. For the 3 & 4 Will. 4, c. 105, places the dower of such women in the power of their husbands; no widow being entitled to dower out of any land which has been absolutely disposed of by the husband in his lifetime, or by his will. And all partial estates, &c., created by the husband, and all his debts, &c., are effectual against the widow's right to dower. The husband may also bar her right to dower, either wholly or partially, by any declaration for that purpose made by him by any deed, or by his will, or by a devise to her of land or any estate therein,(g) out of which she would be dowable; but not by a bequest of personal estate, or of land not liable to dower, unless a contrary intention appears (sects. 4 to 10).

To be an effectual bar to dower at law, the jointure must be made to take effect immediately after the death of the husband, and must be for

(a) 6 Byth. & Jar. Conv. 254, 4th edit.

(b) *Bond v. Walford*, 32 Ch. Div. 238; 55 L. J. 667, Ch.; 54 L. T. Rep. N. S. 672.

(c) *Essery v. Cowlard*, 26 Ch. Div. 191; 51 L. T. Rep. N. S. 60; 53 L. J. 661, Ch.; 32 W. R. 518.

(d) *McDonnell v. Hasilrige*, 16 Beav. 346.

(e) See Lewin, *Trusts*, 949, 951, 10th edit.; Macq. H. & W. 325, 326, 3rd edit.; *Howard v. Digby*, 2 Cl. & Fin. 634.

(f) See 6 Byth. & Jar. Conv. 386, 6th edit.; and for forms, see *Id.*, p. 689; 2 Prid. Conv. 369, 17th edit.

(g) See hereon, *ante*, p. 137.

her own life and not *par autre vie*, or other less estate. It must be in satisfaction of her whole dower and not of any particular part of it. And it must be made before marriage, or the widow may elect whether she will take it or her dower, for during coverture she was incapable of consenting.(a) The mode of recovering the wife's jointure is shown *post*.

The Life Estate.—This is usually limited to the settlor *without* impeachment of waste, which enables him, irrespective of his powers under the Settled Land Act, 1882, to cut timber, not being ornamental timber, and to open mines, &c., and to appropriate the profits to his own use and benefit.(b)

If the estate for life be not limited without impeachment of waste, the tenant for life would, subject to his rights under the Settled Land Act, 1882, to cut timber (sect. 35), and to grant mining leases (sect. 6), be liable for voluntary or actual waste, that is, such acts as are destructive of any material part of the inheritance, as pulling down houses, or opening new and unworked mines, &c.(c) But he may continue the working of mines already open.(d) Nor can he save under the above statute, or for the repair of buildings and fences, cut timber,(e) unless the estate is a timber estate, that is, an estate cultivated for the produce of valuable timber, when he may cut timber periodically.(f) And he may cut down timber-like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cutting.(g)

As to what is included in the word "timber," see *ante*, p. 53.

Waste is not only voluntary or actual, but it may also be permissive, as by allowing buildings to remain out of repair.(h) But a tenant for life of freeholds seems only to be liable for permissive waste when he is under some obligation to keep the premises in repair.(i)

Waste may be also legal or equitable, the latter being such injurious acts as were not punishable at law, as where a tenant for life, not impeachable for waste, pulls down the family mansion or cuts down ornamental timber, which, however, *equity* restrained by injunction.(k) And by 36 & 37 Vict. c. 66, s. 25 (3), a tenant for life unimpeachable for waste has now no *legal* right to commit equitable waste, unless an intention to that effect expressly appears by the instrument creating the

(a) See 1 St. C. 273, 10th edit.; Tnd. L.C.C. 55, *et seq.*, 2nd edit.

(b) Will. R. P. 25, 18th edit.

(c) Co. Lit. 53 b.; Will. R. P. 23, 24, 18th edit.

(d) Will. R. P. 23, 24, 18th edit.; *Elias v. Snowdon Slate Quarries Company*, 4 App. Ca. 455.

(e) Will. *sup.*

(f) *Dashwood v. Magniac*, (1891) 3 Ch. 306; 60 L. J. 809, Ch.

(g) *Honywood v. Honywood*, L. R. 18 Eq. 306; 43 L. J. 652, Ch.; 30 L. T. Rep. N. S. 671; 22 W. R. 749.

(h) *Lewis Bowles' Case*, L. C. Conv. 90, 2nd edit.

(i) See *ante*, p. 338; *et post*, tit. "Wills."

(k) *Garth v. Sir J. H. Cotton*, 1 L. C. Eq. 808, 6th edit.; *Baker v. Sebright*, 13 Ch. Div. 179.

estate. The 45 & 46 Vict. c. 38 (Settled Land Act, 1882), however, provides that certain acts by a tenant for life, which would otherwise be acts of waste, shall be allowable when done for the purpose of making improvements under this Act (sect. 29); and also enables him to cut timber fit for cutting, with the consent of the trustees of the settlement or order of the court (sect. 35), as will be more fully shown subsequently. And as already stated, (a) he can under the Act grant mining leases made in accordance with its provisions. But, as will be shown subsequently, he must, during such period as the Board of Agriculture (b) may prescribe, maintain and repair, at his own expense, improvements executed under the Act, and insure against damage by fire insurable buildings comprised therein, in such amount as the board may prescribe (sect 28).

A tenant for life is, as a rule, bound to keep down the interest on incumbrances upon the estate falling due while he is in possession to the extent of the income he receives therefrom; but he is not bound to pay arrears of interest accrued before his possession. (c) And the obligation of the tenant for life to keep down the interest exists only, it seems, as between him and the remainderman, and not as between him and the incumbrancers. (d) But where several incumbered estates are given to a tenant for life together as an aggregate whole, he must apply the aggregate income in keeping down the aggregate annual charges in respect of the incumbrances. (e)

After the limitation of the life estate, and subject to the wife's jointure rent-charge, the trusts for the benefit of the younger children follow, which we will now state in detail.

The Portions Term.—The object of this term is to provide portions for the younger children of the marriage equally, to the exclusion of the elder son taking the estate settled, and is briefly expressed thus: for any child or children "other than an eldest or only son entitled for the time being under the settlement to the hereditaments for an estate tail (male or general) in possession or remainder immediately expectant on the death of the" tenant for life. (f) Yet even under a clause of this nature difficulties have arisen as to who is an elder son and who are younger children.

However, where real estate is limited by a settlement made by a parent or person *in loco parentis* on the first and other sons in tail, and portions are provided for younger children, the general rule is, if not controlled by the words of the settlement, that no child taking the estate settled before the portions become distributable will be allowed to take any share in the

(a) *Ante*, p. 288.

(b) See 52 & 53 Vict. c. 30, ss. 2, 11; under the Settled Land Act it was the Land Commissioners.

(c) *Sharshaw v. Gibbs*, 1 Kay, 333; 23 L. J. 451, Ch.

(d) *Re Morley*, L. R. 8 Eq. 594; *Syer v. Gladstone*, 30 Ch. Div. 614; 34 W. R. 565.

(e) *Frewen v. Law Life Assurance*, (1896) 2 Ch. 511; 75 L. T. Rep. N. S. 17; 65 L. J. 787, Ch.; 44 W. R. 682.

(f) See 6 Byth. & Jar. Conv. 404, 690, 4th edit.

sum provided for the portions. Therefore if an eldest son dies without issue before the time when the portions become distributable, and the second son becomes an eldest son, and entitled as such to the settled estates, he is excluded from a share in the portions fund; for eldest son does not necessarily mean "first-born," but he who takes the family estate.(a)

And this rule also applies when real estate is provided for younger children instead of personalty.(b)

On the other hand, if the eldest son dies before his estate tail falls into possession without inheritable issue, and without having disentailed, his representatives will, under a limitation of the portions fund, "for all the children of A. other than an eldest or only son for the time being entitled to the settled estates" take a portion.(c) The persons entitled must be ascertained at the time when the money is directed to be raised and distributed, and the words of exception attach at that time upon the son who then answers the description of eldest son, and to exclude him only from the class of persons interested.(d)

An elder son provided for by a stranger only is, it seems, considered as a younger son.(e) And where a settlor provides portions for younger children generally without the ingredient that one is to take the family estates, and others to have the portions, then "eldest" is taken to mean the eldest actually, and "younger" to mean younger actually, and the time for ascertaining who is eldest and who are younger is not the period of distribution but the period of vesting; and the eldest son only will be excluded, and a younger son who becomes the eldest will be entitled to a share in the fund.(f)

The usual period fixed by a settlement for the vesting of portions is as to sons at twenty-one, and as to daughters at twenty-one or marriage under that age, with a declaration that the portions though vested are not to be payable until after the death of the tenant for life, except with his consent.(g)

The amount of the portions money ultimately raisable is by the settlement usually made to depend on the number of younger children who attain vested interests. That is to say, if there be but one such younger child a certain sum is fixed, and if there be two such younger children, a

(a) *Collingwood v. Stanhope*, L. R. 4 Ho. L. Cas. 43; *Teynham (Lord) v. Webb*, 2 Ves. 198; *Ellison v. Thomas*, 1 De G. J. & S. 18; 7 L. T. Rep. N. S. 342; 32 L. J. 32, Ch.

(b) *Re Bayley*, 6 Ch. App. 590; 25 L. T. Rep. N. S. 249; 19 W. R. 789.

(c) *Ellison v. Thomas*, sup.; *Re Fitzgerald's Estate*, (1891) 3 Ch. 394; 60 L. J. 624, Ch.; 65 L. T. Rep. N. S. 242; 40 W. R. 29.

(d) *Ellison v. Thomas*, sup.; *Collingwood v. Stanhope*, sup.; *Reid v. Hoare*, 26 Ch. Div. 363, 369; 53 L. J. 486, Ch.; 50 L. T. Rep. N. S. 257; 32 W. R. 609.

(e) *Lewin, Trusts*, 450, 10th edit.; *Duke Doidge*, 2 Ves. 203, n.; *Hall v. Hower*, Amb. 203.

(f) *Adams v. Adams*, 25 Beav. 652; *Domville v. Winnington*, 26 Ch. Div. 382; 53 L. J. 782, Ch.; *Lewin, Trusts*, 451, 10th edit.

(g) *Lewin, Trusts*, 453, 10th edit.

larger sum, and if there be three or more such younger children, a larger sum still is named.(a)

It is also declared by the settlement that the amount raised shall be divided amongst the younger children, if more than one, in such shares and manner as the settlor shall by deed or will appoint, and, in default of appointment amongst them in equal shares, payable at the times already mentioned. And to prevent any child taking a double portion, a clause is next introduced called the *hotchpot* clause, which provides that no child taking a share under an appointment shall take any share in the unappointed part without bringing his appointed share into hotchpot and accounting for the same. That is, until each of the other children shall have received a share equal to the appointed share.(b)

The mode of raising the portions is usually directed by the settlement to be effected either by a mortgage of the property comprised in the term, or out of the rents and profits thereof, or by a sale of timber or minerals, or by all or any of those means, or any other reasonable means. But a sale of the property is *prima facie* undesirable.(c)

A trust to raise portions by mortgage will not authorise a sale; but if the trust is to raise the amount by mortgage *or otherwise*, a power of sale is implied.(d) And when portions are directed to be raised out of rents and profits simply, and a gross sum is named, and a definite time fixed for payment, the ordinary and *prima facie* meaning of rents or annual income is taken to be inconsistent with these directions, and recourse may be had to the *corpus* by sale or mortgage.(e)

A power for trustees to raise portions by mortgage implies a power to raise the incidental costs thereof.(f)

The right to and the rate of interest, and the time from which it is to be calculated, in regard to the portions, should be specified in the settlement, but, if not so specified, portions charged on land carry interest from the time the portions ought to have been raised,(g) at 4 per cent.(h)

The trusts of the portions term may also include a direction to the trustees, after the death of the tenant for life, to raise out of the rents and profits of the premises comprised in the term, &c., for the maintenance and education of any child entitled to a portion in expectancy, an annual sum not

(a) See Lewin, Trusts, 469, 10th edit.; and Forms, 2 Prid. Conv. 380, 16th edit.; 6 Byth. & Jar. Conv. 690, 4th edit.; 3 David. Conv. 988, pt. 2, 3rd edit.; David. Conc. Pr. 522, 17th edit.

(b) 3 David. Conv. pt. 1, 169, 3rd edit.

(c) 3 David. Conv. 446, pt. 1, 3rd edit.; Lewin, Trusts, 479, 10th edit.; 6 Byth. & Jar. Conv. 691, 4th edit.

(d) *Tasker v. Small*, 6 Sim. 625; Lewin, Trusts, 479, 10th edit.

(e) *Backhouse v. Middleton*, 1 Ch. Ca. 175; *Sheldon v. Dormer*, 2 Vern. 310; Lewin on Trusts, 480, 10th edit.; 3 David. Conv. 447, pt. 1, 3rd edit.

(f) *Armstrong v. Armstrong*, L. R. 18 Eq. 541; 43 L. J. 719, Ch.; Lewin, Trusts, 478, 10th edit.

(g) *Hall v. Carter*, 2 Atk. 358; *Pomfret (Earl of) v. Lord Windsor*, 2 Ves. Sen. 472, 487; Lewin, Trusts, 469, 10th edit.

(h) *Balfour v. Cooper*, 23 Ch. Div. 472; 52 L. J. 495, Ch.; 31 W. R. 569.

exceeding what the interest on the portion of such child would amount to at 4 per cent. A further trust for the advancement of the younger children follows. And, subject to the foregoing trusts, the rents and profits of the premises comprised in the portions term are to be received by the person entitled in remainder immediately expectant on the term.^(a)

As to the propriety of inserting in the settlement an express clause for the *maintenance* of younger children during minority, it is necessary to bear in mind the statutory powers hereon.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43, where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently, on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for the infant's maintenance, education, or benefit, the income of the property or any part thereof, whether there is any other fund applicable for that purpose, or any person bound by law to provide for the infant's maintenance or education, or not (sub-sect. 1).

The trustees are to accumulate all the residue of the income in the way of compound interest, by investing the same and the resulting income thereof, from time to time, on such securities as they are, by the settlement, or by law, authorised to invest trust money, and are to hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but with power at any time to apply the accumulations, or any part thereof, as if they were current year's income (sub-sect. 2).

This section applies to instruments coming into operation either before or after the 31st December, 1881, but only so far as a contrary intention^(b) is not expressed in the instrument under which the infant's interest arises (sub-sects. 3, 4).

Sect. 43 replaces sect. 26 of 23 & 24 Vict. c. 145 (Lord Cranworth's Act), which is repealed by sect. 71 of 44 & 45 Vict. c. 41.

If the vesting of the interest in the property is postponed beyond the age of twenty-one years, sect. 43 does not apply,^(c) and in such an event an express clause would be necessary. But it has been held that under sect. 43 maintenance can be allowed to the infant members of a class out of the shares of income to which they respectively are contingently entitled, although some of the members of the class have by attaining majority acquired a vested interest in their shares.^(d) Also that the statutory power of maintenance applies where the interest of the infant is

(a) See 3 David. Conv. 455, pt. 1, 3rd edit., and Forms, 2 Prid. Conv. 374, 17th edit.; 3 David. Conv. 991, 999, pt. 2, 3rd edit.; 6 Byth. & Jar. Conv. 692, 694, 4th edit.; David. Conc. Pr. 524, 17th edit.

(b) See *Re Thatcher's Trusts*, 26 Ch. Div. 426; 32 W. R. 679; 53 L. J. 1050, Ch.

(c) See *Re Judkins' Trusts*, 25 Ch. Div. 743; 53 L. J. 496, Ch.; 50 L. T. Rep. N. S. 200; 32 W. R. 407.

(d) *Re Holford*, (1894) 3 Ch. 30, 47; 63 L. J. 637, Ch.; 70 L. T. Rep. N. S. 777; 42 W. R. 563, C. A., overruling *Re Jeffery*, (1891) 1 Ch. 671.

liable to be diminished by the birth of more children, which contingency may not happen till after the infant attains twenty-one.(a)

As already stated, after the maintenance clause, if one, an express clause for advancement usually follows, as there is no power for advancement implied by any statute. This clause enables the trustees of the settlement upon the written request of the tenant for life during his life, and after his death at their discretion, to raise (by the means already detailed) any part not exceeding one-half of the expectant or presumptive portion of any son (or child if the power is to apply to daughters), and apply it for his (or her advancement) preferment or benefit; the amount so raised to be reckoned as part of the advanced child's share.(b)

This power of advancement is, however, usually confined in settlement of realty to expectant or presumptive shares;(c) but it would seem advisable to extend it to vested interests also, as without express authority it may be questioned whether such an advancement would in all cases be proper.(d) Again, the power is by some conveyancers made applicable for the benefit of sons only,(e) probably because in families where realty is settled there is not much probability of there being any necessity to set up daughters in business, but it is often convenient to resort to such a power on the marriage of a daughter in the parents' lifetime.(f) And some conveyancers make the power applicable to children, which of course includes daughters.(g)

In settlements of personalty it may be mentioned that the power of advancement is invariably made applicable to vested as well as to expectant shares, and to daughters as well as to sons.(h)

It is said that an advancement should be made with a view to affording some permanent provision for the object, or for his establishment in life, as opposed to a small or merely temporary benefit.(i) The words of the power will, however, be looked at in each case. Thus, where in a will the words were "in or towards the preferment or advancement of L. or otherwise for his benefit," it was held that the words "or otherwise for his benefit" enabled the trustees to pay off the debts of L.(k)

(a) *Re Jeffery*, (1895) 2 Ch. 577; 64 L. J. 830, Ch.; 73 L. T. Rep. N. S. 322; 44 W. R. 61.

(b) See 6 Byth. & Jar. Conv. 311, 4th edit.; 3 David. Conv. 454, pt. 1, 3rd edit. ;

(c) See Forms, David. Conc. Pr. 525, 17th edit.; 6 Byth. & Jar. Conv. 692, 4th edit.; 3 David. Conv. 991, pt. 2, 3rd edit.; 2 Prid. Conv. 374, 17th edit.

(d) See Vaizey on Settl. 1052; *Molyneux v. Fletcher*, (1898) 1 Q. B. 648; 67 L. J. 392, Q. B.; 78 L. T. Rep. N. S. 111; 46 W. R. 576.

(e) 3 David. Conv. 455, pt. 1; 991, pt. 2, 3rd edit.; 2 Prid. Conv., *sup.*; David. Conc. Pr., *sup.*

(f) Vaizey on Settl. 1052; and see 3 David. Conv. pt. 1, 172, 3rd edit.

(g) See 2 Key & E. Conv. 632, 4th edit.; 6 Byth. & Jar. Conv. 692, 4th edit.

(h) 2 Key & E. Conv. 490, 4th edit.; 6 Byth. & Jar. Conv. 547, 4th edit.; 3 David. Conv. 715, pt. 2, 3rd edit.; 2 Prid. Conv. 298, 16th edit.; 293, 17th edit.; *et post.*

(i) 6 Byth. & Jar. Conv. 312, 4th edit.; *Taylor v. Taylor*, L. R. 20 Eq. 155.

(k) *Lowther v. Bentinck*, L. R. 19 Eq. 166; 31 L. T. Rep. N. S. 719; 44 L. J. 197, Ch.

Management Clause.—After the declaration of the trusts of the portions term there was usually inserted a clause providing for the receipt and application of the rents and management of the estate during minorities of the persons beneficially entitled.^(a)

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42, however, it is enacted that if and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if none, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or part thereof, or with power of consent thereto, or if none, then any persons appointed as trustees for this purpose by the court, on the application of the infant's guardian or next friend, may enter into and continue in possession of the land; and the provisions of the section next set out are to apply.

The trustees are to manage or superintend the management of the land, with full power to fell timber or cut underwood in the usual course for sale, or repairs, or otherwise; and to erect, pull down, and rebuild and repair houses, &c.; to continue the working of mines, &c., which have usually been worked; to drain or improve the land; to insure against loss by fire; to make allowances to and arrangements with tenants and others, and to determine tenancies and accept surrenders of leases and tenancies, and generally to deal with the land in a due course of management, including the payment of expenses, and of any annual sum, and the interest of any principal sum, charged on the land; but where the infant is impeachable of waste the trustees are to manage so as not to commit waste (sub-sects. 1, 2, 3).

They may also, at discretion, apply any income for the infant's maintenance, education, or benefit, or pay thereout money to the infant's parent or guardian, to be applied for the same purposes (sub-sect. 4).

The trustees are to lay out the residue of the income in investment on securities on which they are, by the settlement, if any, or by law, authorised to invest trust money, with power to vary the investments, and are to accumulate the income of the investments by way of compound interest, by similarly investing such income, and the resulting income, and to stand possessed of the accumulated fund arising from income of the land and from investments of income on the following trusts:

1. If the infant attains the age of twenty-one years, then in trust for the infant.

2. If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, her receipts, though an infant, to be a good discharge.

3. But if the infant dies under age, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail, or tail male or tail female,

(a) 3 David. Conv. 463, pt. 1, 3rd edit., and for a Form see *Id.*, pt. 2, p. 999; 6 Byth. & Jar. 694, n. 4th edit.; David. Conc. Pr. 526, 527, 17th edit.

on the trusts, if any, declared of the accumulated fund by that settlement; but if no such trusts are declared, or the infant took the land from which the accumulated fund is derived by descent and not by purchase, or the infant is tenant in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations may at any time be applied as if they were income arising in the then current year (see sub-sect. 5).

Where the infant's estate or interest is an undivided share of land, the powers of the section relative to the land may be exercised jointly with the persons entitled to possession of, or having power to act in relation to, the other undivided shares (sub-sect. 6).

This section applies only to instruments coming into operation *after* 31st December, 1881, and only if and so far as no contrary intention is expressed therein (sub-sects. 7, 8).

It will be noticed that the provisions of sub-sect. 4 of sect. 42, and sub-sect. 1 of sect. 43 (*ante*, p. 420), as to maintenance, are permissive and not directory; and that sect. 42 applies to *land*, while sect. 43 applies to *any property* (both of which are defined by sect. 2 of the Act); also that sect. 42 applies only to settlements coming into operation after 31st December, 1881, while sect. 43 applies to instruments coming into operation before or after that date. Again, the destination of the accumulated fund mentioned in sect. 42 is not expressed in the same way as that arising under sect. 43. And in a case (decided on sect. 26 of 23 & 24 Vict. c. 145, which was similar to sub-sect. 2 of sect. 43 of the Conveyancing Act of 1881), it was held that accumulations of income of property vested in an infant, but subject to be divested in case of his death under twenty-one, which happened, belonged to the infant and not to the remainderman who ultimately became entitled to the property from which the accumulations arose.^(a)

Consequently, the powers of management and maintenance given by sect. 42, coupled with the powers which the trustees would possess on behalf of the infant under sect. 60 of the Settled Land Act, 1882 (*ante*, p. 290; *et post*), are considered to be sufficient for all ordinary purposes, subject to any direction as to the destination of the accumulations;^(b) but the general trustees of the settlement should be expressly appointed trustees for the purposes of this enactment as well as of the settled Land Acts.^(c)

Perpetuities and Accumulations.—This is a convenient place to briefly state the law on these points. The law favours the free disposition of property, and consequently prohibits real or personal property from being settled or tied up for a longer period than the lives of fixed existing persons and twenty-one years after their decease, allowing a further time

(a) *Re Buckley*, 22 Ch. Div. 583; 52 L. J. 439, Ch.

(b) 2 Key & E. 576, 577, 5th edit.; 6 Byth. & Jar. Conv. 694, n. 4th edit.

(c) See 2 Key & E. *ubi sup.*; and for a clause to this effect see 2 Prid. Conv. 352, 14th edit.; 384, 16th edit.; 376, 17th edit.

for gestation if it actually exists. The period allowed for vesting is computed in the case of a deed from its date, and in the case of a will from the death of the testator.(a) This is in analogy to the restriction imposed on the creation of contingent remainders, which does not permit a remainder to be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn child.(b)

Shifting uses cannot be so limited as to tend to a perpetuity, nor by a parity of reason can a power be reserved to create such a future use as would have that tendency, if contained in the deed creating the power.(c)

Generally speaking, a general power over the fee, that is, a right to appoint to whomsoever the donee pleases, has no tendency to a perpetuity, as the time for vesting is reckoned from the execution of the power and not from its creation.

A particular power, that is, where the donee is restricted to some objects designated in the deed creating the power, as to his own children, has such a tendency, as the time of visiting runs from the instrument creating the power. Therefore, under such a power no estate can be created which would not have been valid if limited in the deed creating the power.(d)

However, the court, to prevent the total disappointment of a testator's intention by the operation of the rule against perpetuities, where the gift is of real estate, will apply the doctrine of *cy près*. Thus, if lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, as this remainder is void, the court under the above doctrine, gives to the parent the estate tail that was designed for the issue.(e) But this doctrine is confined to wills, and does not apply to limitations of personal estate.(f)

A power of sale and exchange given to the trustees of a settlement indefinite as to the time of its execution, is not void for remoteness, but will continue until the remainder or reversion falls into possession, when as a rule it determines;(g) but it seems that it may continue to exist for a reasonable time after the above event if an intention to that effect is shown by the settlement;(h) also where there is a trust for sale.(i)

(a) *Cadell v. Palmer*, L. C. Conv. 424, 465, 3rd edit.; Jarm. Wills, 213, 216, 5th edit.; Sug. Pow. 397, 8th edit.

(b) See Will. R. P. 320, 13th edit.; *Whitby v. Mitchell*, 44 Ch. Div. 85; 59 L. J. 485, Ch.; 62 L. T. Rep. N. S. 771; 38 W. R. 337.

(c) Sug. Pow. 31, 151, 8th edit.; *Whitby v. Mitchell*, sup.

(d) Sug. Pow. 394, 396, 8th edit.; and see *Re Abbott*; *Peacock v. Frigout*, (1893) 1 Ch. 54; 67 L. T. Rep. N. S. 794; 62 L. J. 46, Ch.; 41 W. R. 154.

(e) 1 Jarm. Wills, 267, 5th edit.; *Humberston v. Humberston*, 1 P. Wms. 332; *Parfit v. Hember*, L. R. 4 Eq. 443.

(f) 1 Jarm. Wills, 270, 5th edit.; *Routledge v. Dorrill*, 2 Ves. Jur. 364; Sug. Pow. 502, 8th edit.

(g) Sug. Pow. 152, 851, 8th edit.; Vaiz. Settl. 365.

(h) *Re Cotton*, 19 Ch. Div. 624; 51 L. J. 514, Ch.; *Re Sudeley (Lord) and Baring*, (1894) 1 Ch. 334; 63 L. J. 194, Ch.; 70 L. T. Rep. N. S. 549; 42 W. R. 231.

(i) *Re Tweedie and Miles*, 27 Ch. Div. 315; 54 L. J. 71, Ch.; 33 W. R. 133.

Limitations depending upon a prior limitation, which is void for remoteness, are themselves invalid.(a)

In addition to the limit already mentioned a further restriction has been imposed by statute as to the accumulation of income of property for the benefit of any future owner. By 39 & 40 Geo. 3, c. 98 (commonly called the Thelusson's Act), no person can settle, &c., any real or personal property, so that the rents or produce thereof shall be accumulated for longer than (1) the life of such grantor or settlor, or (2) twenty-one years from the death of such grantor, settlor, deviser, or testator, or (3) during the minority of any person living or in *ventre sa mère* at the death of such grantor, deviser, or testator, or (4) during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated (sect. 1).

But the Act does not extend to (i.) any provision for the payment of debts, or (ii.) for raising portions for children, &c., or (iii.) to any direction touching the produce of timber or wood (sect. 2).

By 55 & 56 Vict. c. 58, however, after the Act, no accumulation of the rents, or income of any property, can be directed for the *purchase of land only* for a longer period than during the *minority* of any person who, under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents or income so directed to be accumulated.

Any direction to accumulate income which may exceed the period allowed by the stat. of Geo. 3, is valid to the extent of the period allowed by the Act, but void as to the excess. And if the direction to accumulate should exceed the limits allowed by law for the creation of executory interests, it will be void altogether, independently of the above statute.(b)

As to the second exception from the Act, "portions for children" are generally understood to be sums of money secured to them out of property springing from or settled upon their parents. But there is no reason for putting a strained interpretation upon the expression portions for children used by the Act.(c)

Powers.—We have already(d) set out the powers which were formerly inserted in settlements of realty. Recent legislation has, however, to some extent, as already shown, rendered the insertion of many of such enumerated powers unnecessary; for, as to the power to distrain for the wife's jointure, the 44 & 45 Vict. c. 41, s. 44, if no contrary intention is expressed in the trust instrument, gives to a person entitled to receive out of land or the income thereof an annual sum, whether charged by way of rent charge or otherwise, not being rent incident to the reversion, power to enter on the land charged and distrain for the same, and the costs and

(a) *Re Abbott*; *Peacock v. Frigout*, sup.

(b) *Griffiths v. Vere*, 9 Ves. 126; L. C. Conv. 509, 3rd edit.; Will R. P. 363, 16th edit.

(c) *Jones v. Maggs*, 9 Hare, 607; Tud. L. C. C. 515, 3rd edit.; 6 Byth. & Jar. Conv. 417, 4th edit.

(d) *Ante*, p. 413.

expenses thereof, if it is overdue for twenty-one days ; and if it is overdue for forty days, such person may enter into possession of the land charged and take the income thereof until the amount due and all costs and expenses are paid (sub-sects. 1-3, 5). A power to limit a term is next given by sub-sect. 4 for further securing the amount payable.

Express powers to this effect, therefore, in settlements are no longer necessary.(a)

So the trust or power for maintenance of younger children, and for management of the estate during minorities, are superseded to the effect already stated by statutory provisions.

As to the power given by the settlement to the tenant for life, and after his death to the trustees thereof, to grant leases of the settled land, and also to enter into preliminary contracts for leases and to surrender existing leases : we have shown fully,(b) that by the Settled Land Act, 1882 (and Amendment Acts), a tenant for life of settled land, and any person having the powers of a tenant for life, may lease and contract to lease the settled land and accept surrenders of existing leases, in accordance with the provisions of the Acts, and that he cannot by the settlement or otherwise be prohibited from so doing. The ordinary powers of leasing formerly inserted in settlements may now, therefore, be omitted. But if it is wished to grant leases for longer terms than those prescribed by the Act an express power to that effect should be inserted in the settlement, so as to obviate an application to the court under sect. 10 of the Act.(c)

The powers to sell, exchange, and make partition of settled lands were, by the settlement, formerly usually conferred upon the trustees thereof with the written consent of the tenant for life. The 23 & 24 Vict. c. 145, had provided (in order to shorten settlements), that where a settlement, &c., authorised a sale or exchange, the usual provisions as to the exercise of such a power, and as to the application of the moneys arising from the sale, or received for an equality of exchange, should thereupon be annexed and incident to the power (see sects. 1-10).

These provisions were repealed by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 64, and schedule, and new powers given, to be noticed presently.

The 56 & 57 Vict. c. 53, s. 13 (repealing and re-enacting 44 & 45 Vict. c. 41, s. 35), provides that where a trust for sale or a power of sale of property is vested in a trustee he may, if a contrary intention is not expressed in the instrument, sell or concur in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions of sale as the trustee thinks fit, with power to vary or rescind any contract for sale, and to buy in and resell, without being answerable for any loss (sub-sects. 1, 2 ; see also *ante*, pp. 25, 27, 28, 51, as to sales by trustees).

(a) See 2 Prid. Conv. 370, n. 17th edit. ; Wolst. & B. Conv. 106, 8th edit.

(b) *Ante*, pp. 286 to 293.

(c) *Ante*, p. 288 ; *et* sect. 57 of the Act.

The section only applies to instruments operating after 31st December, 1881 (sub-sect. 3).

As to the powers of trustees to give receipts for purchase moneys, it has already been shown that prior to 22 & 23 Vict. c. 35, s. 23, a purchaser of realty from trustee vendors was bound to see to the application of the purchase money, unless it was declared by the trust instrument, either expressly or by implication (*ante*, p. 25), that the trustees' receipts were to be a good discharge. By 56 & 57 Vict. c. 53, s. 20 (repealing and re-enacting sect. 36 of 44 & 45 Vict. c. 41), it is, however, provided that the receipt in writing of any trustee for any money, securities, or other personal property or effects, payable, transferable, or deliverable to him under any trust or power is to be a sufficient discharge for the same, and to effectually exonerate the person paying, &c., the same from seeing to the application or being answerable for any loss or misapplication thereof.

And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the receipt in writing of the trustees of a settlement, or of one trustee, *if one is empowered to act*, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him, effectually discharges the payer or transferrer therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, &c. (sect. 40); see also *ante*, p. 151, as to a trustee appointing a solicitor as his agent for the purpose of giving a discharge for purchase money.

Under the above enactments the clause formerly inserted in settlements enabling trustees to give receipts may now be omitted.

Powers under Settled Land Acts.—We now come to speak of the provisions of the Settled Land Acts, respecting the powers of sale, exchange, and partition formerly inserted in settlements of real estate. These provisions may be said, generally speaking, to give to the tenant for life and other limited owners, (a) without the consent of the trustees of the settlement, powers which, as we have shown, were formerly vested in the trustees, with the consent of the tenant for life, or in the trustees without such consent; notice to the trustees being now substituted.

By sect. 3 of the Act of 1882 a tenant for life (1) may (except as stated *infra*) sell the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same; (b) and (2) may make an exchange of the settled land or any part of it for other land, including an exchange in consideration of money paid for equality of exchange; and (3) may concur in making partition of the entirety of undivided shares of settled land, including a partition in consideration of money paid for equality of partition.

The sale must be made at the best price, and the exchange and

(a) See *ante*, p. 292.

(b) When the settlement comprises a manor, this power is extended to the sale of the seignory of freehold land within the manor or the freehold and inheritance of any copyhold or customary land, parcel of the manor, &c., so as to effect an enfranchisement (sect. 3, ii.), as shown, *ante*, p. 385.

partition at the best consideration in land, or land and money, that can be reasonably obtained (sect. 4, sub-sects. 1, 2).

A sale made be made in one lot or in several lots, either by auction or private contract; and the tenant for life may fix reserve biddings, and buy in. On a sale, exchange, or partition stipulations respecting title, evidence of title, or other things may be made, and any restriction or reservation with respect to building on or other user of the land, or as to mines and minerals, &c., may be imposed or reserved by covenant or otherwise, on the tenant for life and the settled land, or on the other party and any land sold or given in exchange or on partition to him (sect. 4, sub-sects. 3 to 6).

Settled land in England cannot, however, be given in exchange for land out of England (sub-sect. 8).

Where on a sale, exchange, or partition, there is an incumbrance affecting the land sold or given in exchange or on partition, the tenant for life may, with the consent of the incumbrancer, charge such incumbrance on any other part of the settled land, in exoneration of the part sold or so given, and by conveyance of the fee simple, or other estate subject of the settlement, or otherwise, make provision accordingly (sect. 5).

By the Settled Land Act, 1890, on an exchange or partition any easement, right, or privilege may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right or privilege may be given or taken in exchange or on partition for land, or for any other easement, right or privilege (sect. 5).

Sect. 15 of the Act of 1882 contained a restriction as to a sale or lease of the principal mansion house, &c., but this sect. is repealed by sect. 10(1) of the Settled Land Act of 1890, which enacts that notwithstanding anything contained in the Act of 1882 the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged^(a) or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court (sect. 10, sub-sect. 2). And where a house is usually occupied as a farm-house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith, do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the section (sub-sect. 3).

It will be noticed that by sect. 4 of the Act of 1882, sub-sect. 1, the sale must be made at the best price; and if the tenant for life purposes to sell at a price below that offered by the remainderman he may be restrained from selling otherwise than by public auction without first communicating the offer to the remainderman, and giving him a reasonable time to make an advance on the price offered.^(b)

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), sect. 74, enables sales, exchanges, and leases to be made under the Settled

(a) The word "exchanged" was not in sect. 15 of the Act of 1882.

(b) *Wheelwright v. Walker* (No. 2), 31 W. R. 912; W. N. 1883, p. 154.

Land Act, 1882, for the erection of dwellings for the working classes for such consideration as can reasonably be obtained, though a higher price might otherwise have been obtained. And the Settled Land Act, 1890, s. 18, enlarges the meaning of the phrase "working classes."

The Small Holdings Act, 1892 (55 & 56 Vict. c. 31), sect. 12, also enables sales, &c., under the Settled Land Act, 1882, to be made to a county council for the purposes of the Small Holdings Act, for such consideration as can reasonably be obtained; see also sect. 13.

A tenant for life may sell from mere caprice or dislike of the remainderman; but he must sell at the best price. And he may sell without the sanction of the court notwithstanding an administration decree has been made for execution of the trusts of the settlement.^(a) And a tenant for life of an undivided moiety of settled land can sell his moiety under the powers of the Act of 1882, without the concurrence of the owner of the other undivided moiety.^(b)

The court, in the exercise of its discretion under the Settled Land Acts, when asked to sanction the sale of the family mansion and demesnes thereof, will have regard to the well-being of the land, and the interests of the persons from whose industrial occupation the rents and profits are derived, as well as to the interests of those entitled under the settlement.^(c)

We have already stated that on or in connection with a sale or grant for building purposes, or a building lease, the tenant for life may appropriate parts of the settled land for streets, &c., to be vested in trustees, &c., for public use (see fully sect. 16, *et ante*, p. 289).

We have also before stated that a sale, exchange, partition, or mining lease may be made either of land, with or without an exception or reservation of mines and minerals therein, or of any mines and minerals with or without a grant or reservation of powers of working, wayleaves, and rights, &c., connected with mining purposes, in relation to the settled or any other land (sect. 17, *et ante*, p. 289).

And where money is required for enfranchisement, or equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land or any part thereof by conveyance of the fee simple, or other estate the subject of the settlement, or by creation of a term of years therein or otherwise, and the money raised is to be capital money^(d) arising under the Act (sect. 18; see also 53 & 54 Vict. c. 69, s. 11, stated *post*).

And the tenant for life may (1) contract to make any sale, exchange, partition, mortgage, or charge; and may (2) vary or rescind, with or without consideration, the contract, in the like cases and manner as he

(a) *Cardigan v. Curzon-Howe*, 30 Ch. Div. 531, 539; 55 L. J. 71, Ch.

(b) *Cooper v. Belsey*, 68 L. J. 258, Ch.; 80 L. T. Rep. N. S. 69; (1899) 1 Ch. 639, C. A.; overruling *Re Collinge*, 36 Ch. Div. 516.

(c) *Lord Bruce v. Marquis of Ailesbury*, (1892) A. C. 356; 62 L. J. 95, Ch.; 67 L. T. Rep. N. S. 490; 41 W. R. 318.

(d) Capital money arising under the Act and receivable for the trusts and purposes of the settlement, is in the Act referred to as capital money arising under the Act (sect. 2, sub-sect. 9).

might lawfully do if he were absolute owner of the settled land, but the contract as varied must be in conformity with the Act; and any consideration paid in money is to be capital money arising under the Act (sect. 31, sub-sect. 1, i., ii., vi.). And such contract is binding on and enures for the benefit of the settled land, and may be enforced against and by every successor in title for the time being of the tenant for life; but it may be varied or rescinded by such successor, as if made by himself (see sub-sect. 2; and see 53 & 54 Vict. c. 69, s. 6).

As to contracts for leases, see *ante*. p. 289.

We have before stated, when treating of the powers of a tenant for life to grant leases, that by sect. 45 of the Act of 1882 he must, when intending to make a lease, give notice thereof to each of the trustees of the settlement and to their solicitor, if 'the solicitor is known to the tenant for life; provided that at the date of the notice given the number of trustees be not less than two, unless a contrary intention is expressed in the settlement (see fully *ante*, p. 287). A similar notice must be given when the tenant for life intends to make a sale, exchange, partition, mortgage, or charge, subject to the same proviso (sect. 45).

By the Act of 1884, sect. 5, however, the notice required by the above section of intention "to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf" (sub-sect. 1). This sub-section renders the decision in *Re Ray*(a) nugatory, except it would seem as to a "mortgage or charge," which are specified in sect. 45 of the Act of 1882, but not in the above sub-section.(b)

The tenant for life is, upon request by a trustee, to furnish him with particulars with reference to any sale, exchange, partition or lease effected or in progress or immediately intended (47 & 48 Vict. c. 18, s. 5, sub-s. 2). And any trustee may, by writing under his hand, waive notice and accept less than a month's notice (sub-sect. 3).

Where there are no trustees to whom notice can be given, a sale may be stayed by the court until trustees are appointed by the court under sect. 38 of the Act for purposes of the Act.(c) But where persons have been appointed to exercise the powers of a tenant for life who is an infant, under sect. 60 of the Act of 1882 (*post*), trustees need not be appointed for such purpose.(d) It must also be remembered that the Settled Land Act, 1890, s. 16, has extended the definition of trustees contained in the Settled Land Act, 1882, as already (*ante*, p. 412) shown.

A person dealing in good faith with the tenant for life need not inquire respecting the giving of the notice (45 & 46 Vict. c. 38, s. 45 (3), and see sect. 54, *infra*). And neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement, nor

(a) 25 Ch. Div. 464; 50 L. T. Rep. N. S. 50.

(b) See Wolst. & B. Conv. 353, 7th edit.

(c) *Wheelwright v. Walker*, 23 Ch. Div. 752; 48 L. T. Rep. N. S. 70; 31 W. R. 363; 52 L. J. 274, Ch.

(d) *Re Countess of Dudley*, 35 Ch. Div. 339; 17 L. T. Rep. N. S. 10; 56 L. J. 478, Ch.; 35 W. R. 492.

where there are any, the fact that no notice has been given to them by the tenant for life, under sect. 45, prevents his making a statutory title. It is sufficient for the protection of a purchaser that if at the time he comes to complete there are trustees to whom he can pay his purchase money if required by the tenant for life under sect. 22, and who have notice;(a) and it seems the purchaser is protected by sect. 45 (3) if he deals with the tenant for life in good faith, even if there are no trustees of the settlement, and, therefore, no notice is given.(b)

Whether the provisions of sect. 45 as to notice on a sale, exchange, partition or mortgage should be negatived by the settlement, must be a question for each particular case. It will be remembered that by the Settled Land Act, 1890, s. 7, notice has been dispensed with as to leases not exceeding twenty-one years, as already (*ante*, p. 287) shown.

We have also shown that the tenant for life has full power to complete a lease, sale, exchange, partition, mortgage, or charge of land, including copyhold land, by deed (even if the contract were entered into by a predecessor in title), which is effectual to pass the land conveyed, or the easement, &c., created, discharged, from the limitations, powers and provisions of the settlement, and from all estates, interests, and charges, subsisting or to arise thereunder, but subject to all estates, &c., having priority to the settlement, and to certain other estates and interests(c) which will be found fully detailed *ante*, pp. 290, 377.

A conveyance under this section will overreach a sale by the remainderman, though made before the Act.(d)

On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person, dealing in good faith with the tenant for life, is, as against all parties entitled under the settlement, to be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with the requisitions of this Act (sect. 54).

The tenant for life is not entitled to the money arising from a sale, &c., for the Settled Land Act, 1882, sect. 21 *et seq.*, provides for the application of such money, termed by the Act capital money, arising under the Act, which, subject to claims properly payable thereout, &c., is, when received, to be invested or applied as follows:

(1) In investment on Government securities, or on other securities on which the trustees of the settlement are authorised by the settlement or by law to invest the trust money, or on the security of the bonds, mortgages, or debentures, or in the purchase of debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act

(a) *Hatten v. Russell*, 38 Ch. Div. 334; 57 L. J. 425, Ch.; 58 L. T. Rep. N. S. 271; 36 W. R. 317.

(b) *Mogridge v. Clapp*, (1892) 3 Ch. 382; 61 L. J. 534, Ch.; 66 L. T. Rep. N. S. 558; but see *Re Fisher and Grezebrook*, (1898) 2 Ch. 660; 67 L. J. 613, Ch., stated *post*.

(c) See 45 & 46 Vict. c. 38, ss. 20, 55; 53 & 54 Vict. c. 69, s. 6.

(d) *Whelwright v. Walker*, 23 Ch. Div. 752, *supra*, p. 430; and see *ante*, p. 113, as to the effect the execution of a power in a deed.

of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares,^(a) with power to vary the investment into other such securities.

(2) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate settled, or of land tax, rent charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land.

(3) In payment for any improvement authorised by the Act (stated *post*); or (4) for equality of exchange, or partition of settled land.

(5) In purchase of the seignory of any part of the settled land, being freehold, or of the fee simple of any part of the settled land, being copyhold or customary land.

(6) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold for years, or life, or years determinable on life.

(7) In purchase of land in fee simple, or of copyhold or customary land, or of leaseholds held for sixty years or more unexpired at the time of purchase, subject or not to exceptions or reservations of mines or minerals therein, or of rights of working of mines or minerals therein, or in other land.

(8) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, &c., convenient to be held with such land for mining or other purposes.

(9) In payment to any person becoming absolutely entitled, or empowered to give an absolute discharge.

(10) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, &c., of the Act.

(11) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

By the Settled Land Act, 1887 (50 & 51 Vict. c. 30), where an improvement of a kind authorised by the Act of 1882 (*post*) has been or may be made either before or after the passing of this Act, and a rent charge has been, or may be, created under any statute with the object of paying off moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent charge, &c., is to be deemed to be applied in payment for an improvement, authorised by the Act of 1882 (sect. 1). This section was intended to meet the difficulty raised by the decision in *Re Knatchbull*,^(b) where it was held that the tenant for life was not entitled under sect. 21 (2) of the Act of 1882 to have charges created by him before the Act under the Improvement of Land Act, 1864, for drainage. paid out of capital money.

(a) When money is bequeathed to trustees upon trust to lay it out in the purchase of land to be settled in strict settlement, they may invest it in debenture stock under this section; for if the land were bought and settled the tenant for life might at once sell under the power given by the Act. (*Re Mackenzie's Trusts*, 31 W. R. 948; 23 Ch. Div. 750.)

(b) 29 Ch. Div. 588; 53 L. T. Rep. N. S. 284.

But sect. 1 of the Settled Land Act of 1887 is not retrospective so as to enable a tenant for life to be recouped out of capital money instalments of rent charges *paid before* the Act came into operation ;(a) nor does it entitle a tenant for life to be repaid out of capital moneys a sum paid by him in obtaining a reduction of interest on terminable rent charges created under the Improvement of Land Act, 1864.(b) And an order will not be made under this section or under sect. 15 of the Settled Land Act, 1890 (*post*), directing an application of capital money not yet in hand.(c)

By the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11, where money is required for discharging incumbrances on the settled land, the tenant for life may raise the amount so required on mortgage of the settled land, or any part thereof, by conveyance of the fee simple or other estate the subject of the settlement, or by the creation of a term of years therein or otherwise, and the money so raised is to be capital money for that purpose (sub-sect. 1). Incumbrance does not include any annual sum payable only during a life or lives, or during a term of years absolute or determinable (sub-sect. 2.)

Under sect. 18 of the Act of 1882, money could only be raised by mortgage for enfranchisement, or equality of exchange or partition, as already seen,(d) and sect. 47 only applies to costs, which must be by direction of the court; and sects. 5 and 24 (4) apply to transfers of incumbrances.

Sect. 11 of the Act of 1890 gives the tenant for life power to mortgage the unmortgaged part of settled land to pay off incumbrances on the other part; but the court may restrain him from doing so, having regard to sect. 53 of the Act of 1882 (*post*) and the circumstances of the case.(e)

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 29, also provides that capital money under the Settled Land Act may be applied in payment of money expended and costs incurred by a landlord for the improvements mentioned in the first or second parts of the schedule thereto (set out *ante*, p. 370), as for an improvement authorised by the Settled Land Act, &c.

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, amends the Settled Land Act, 1882, as to the improvements on which capital money may be expended, stated *post*.

And by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (7), capital money arising under the Settled Land Act may be expended in paying estate duty in respect of property settled and held upon the same trusts.

It seems, from a case decided under the Settled Estates Act, that

(a) *Re Howard's S. E.*, (1892) 2 Ch. 233; 61 L. J. 311, Ch.; 67 L. T. Rep. N S 156; 40 W. R. 360.

(b) *Re Verney's S. E.*, 67 L. J. 243, Ch.; (1898) 1 Ch. 508.

(c) *Re Marquis of Bristol's S. E.*, (1893) 3 Ch. 161; 69 L. T. Rep. N. S. 304; 62 L. J. 901, Ch.; 42 W. R. 46.

(d) *Ante*, p. 429.

(e) *Hampden v. Earl of Buckingham*, (1893) 2 Ch. 531; 62 L. J. 643 Ch; 68 L. T. Rep. N. S. 86, 695; 41 W. R. 516, C. A.

payment out of court will not be made to a tenant in tail under sect. 21 (9) of the Act of 1882 (*supra*), until he executes a disentailing assurance.(a)

The costs of separate solicitors of several persons having the powers of a tenant for life may be allowed under sect. 21 (10) of the Act of 1882.(b)

It will be seen, therefore, that the proceeds of the sale of settled land may be applied for many purposes besides investment in the purchase of other land to be settled to the same uses as the land sold.

In order that this capital money may be invested or applied, as provided by sect. 21 of the Act of 1882, sect. 22 provides that it shall be paid (1) either to the trustees of the settlement, or (2) into court, at the option of the tenant for life, and be invested or applied accordingly (sub-sect. 1).(c) By sect. 39, however, capital money arising under this Act is not to be paid to fewer than two trustees of a settlement, unless the settlement authorises the receipt of capital trust money of the settlement by one trustee (sub-sect. 1). Subject thereto, the provisions of the Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being (sub-sect. 2; and see sect. 40).

Formerly if the tenant for life had consented to the payment of the capital money into court, it must have remained there and could not be paid out to the trustees on his petition.(d) But by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 14, all or any part of any capital money paid into court may be paid out to the trustees of the settlement for the purposes of the Settled Land Acts.

However, a purchaser is not under the option given by sect. 22 (*supra*) bound to pay the purchase money into court unless there are in existence trustees of the settlement for the purposes of the Act.(e)

By sect. 22 of the Act of 1882 the investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, but in

(a) *Re Broadwood's S. E.*, 1 Ch. Div. 438; and see *Re Reynolds*, 3 Ch. Div. 61; 30 L. T. Rep. N. S. 293; 24 W. R. 991.

(b) *Smith v. Lancaster*, (1894) 3 Ch. 439; 63 L. J. 842, Ch.; 71 L. T. Rep. N. S. 511; 43 W. R. 17.

(c) Any person directed by the tenant for life to pay into court capital money arising under the Act may apply by summons at chambers for leave to do so. The summons must be supported by affidavit setting forth (1) the applicant's name and address; (2) the place where he is to be served with notice; (3) the amount of money to be paid into court, and the account to the credit of which it is to be placed; (4) the name and address of the tenant for life requiring the payment into court; and (5) short particulars of the transaction in respect of which the money is payable (Settled Land Act Rules, Dec. 1882, rr. 10, 11).

Any person paying into court any capital money arising under the Act is entitled first to deduct the costs of paying the money into court (*Ib.*, r. 14).

(d) *Cookes v. Cookes*, 34 Ch. Div. 498; 56 L. J. 397, Ch.; 56 L. T. Rep. N. S. 159; 35 W. R. 402.

(e) *Re Fisher and Grazebrook*, 67 L. J. 613, Ch.; (1898) 2 Ch. 660; 79 L. T. Rep. N. S. 268.

the last-mentioned case subject to any consent or direction specified by the settlement respecting such investment, &c. ; and any investment is to be in the names or under the control of the trustees (sub-sect. 2).

The above sub-section entitles a tenant for life to direct the particular investment in which capital money shall be invested by the trustees. His discretion, if honestly exercised, cannot be controlled by the trustees or by the court.(a)

The investment or application under the direction of the court is to be made on the application of the tenant for life or of the trustees (sub-sect. 3).

By the Settled Land Act Rules, Dec. 1882, the order made upon the summons for payment of capital money into court (see note, *ante*, p. 434) may contain directions for investment thereof on any securities authorised by sect. 21, sub-sect. 1, and for payment of the dividends to the tenant for life, either forthwith or upon production of the written consent of the applicant; the signature thereto to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of the payment into court, the money is not, without the consent of the applicant, to be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested (rule 12); as to which, see *post*.

An investment or application is not to be altered during the life of the tenant for life without his consent (45 & 46 Vict. c. 38, s. 22, sub-s. 4).

Capital money, while remaining uninvested or unapplied, and securities on which an investment thereof is made, is, for the purposes of disposition, transmission, or devolution, to be considered as land, and to be held for and go to the same persons successively in the same manner and for and on the same estates, interests, and trusts as the land wherefrom the money arises would, if not disposed of, have been held and gone under the settlement (sub-sect. 5). And the income of the securities is to be paid or applied as the income of that land would have been payable or applicable under the settlement (sub-sect. 6). The securities may be converted into money, which is to be capital money (sub-sect. 7).

Capital money arising under this Act from settled land in England cannot be applied in the purchase of land out of England, unless the settlement expressly authorises the same (sect. 23).

If land is acquired by purchase, exchange, or on partition it is to be made subject to the settlement thus : (1) freeholds are to be conveyed to the uses, on the trusts, and subject to the powers and provisions which under the settlement, &c., are subsisting with respect to the settled land, &c., but not so as to increase or multiply charges or powers of charging ; (2) copyholds or leaseholds are to be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions of the freeholds. The

(a) *Re Lord Coleridge*, (1895) 2 Ch. 704 ; 73 L. T. Rep. N. S. 206 ; 44 W. R. 59.

beneficial interest in the leaseholds for years is not, however, to vest absolutely in the person who is by the settlement made by purchase tenant in tail, or in tail male or female, and who dies under twenty-one, but on that event happening it is to go as freehold land conveyed as aforesaid would go (sect. 24, sub-sect. 1-3).

This acquired land may be made a substituted security for a charge in respect of money raised and unpaid from which the settled land or any part thereof was released on such acquisition (sub-sect. 4). But where a charge does not affect the whole of the settled land, the land acquired is not to be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (sub-sect. 5). And any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge need not inquire whether the charge is proper (sub-sect. 6).

The provisions of this section also apply, as far as may be, to mines and minerals, easements, and rights, &c. (sub-sect. 7).

By sect. 33, where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option for the tenant for life, invest or apply it as capital money arising under the Act^(a) (see also sect. 32 as to the application of money in court under the Land Clauses Consolidation Acts, &c.).

And by sect. 34 of the Act of 1882, where capital money arising under the Act is purchase money paid in respect of a lease for years or life, or other estate or interest in land less than the fee simple, or in respect of a reversion dependent on such lease, estate, or interest, the trustees of the settlement, or the court on the application of a party interested in the money, may, notwithstanding anything in the Act, cause the same to be invested, accumulated, and paid in such manner as will give to the parties interested in the money the like benefit therefrom as they might have had from the lease, &c. (sect. 34). If the tenant for life applies to the court under this section, notice of the application must be served upon the trustees (Settled Land Act Rules, Dec., 1882, r. 4).

It has already been stated that capital money arising under this Act may by sect. 21 (3) be applied in payment for any improvement authorised by this Act, which are by sect. 25 defined to be the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or works for purposes, &c., incident thereto (namely):

- (i.) Drainage, including straightening, widening or deepening of drains, streams, and watercourses.
- (ii.) Irrigation ; warping.

^(a) See *Re Gee and Pearson*, 64 L. J. 606, Ch.; *Re Soltan's S. E.*, 79 L. T. Rep. N S. 335; (1898) 2 Ch. 629.

(iii.) Drains, pipes and machinery for supply and distribution of sewage as manure.

(iv.) Embanking or weiring from a river or lake, or from the sea or a tidal water.

(v.) Groynes, sea walls, defences against water.

(vi.) Inclosing, straightening of fences, redivision of fields.

(vii.) Reclamation, dry warping.

(viii.) Farm roads, private roads, roads or streets in villages or towns.

(ix.) Clearing, trenching, planting.

(x.) Cottages for labourers, farm servants, and artisans employed on the settled land or not. (The housing of the Working Classes Act, 1890, sect. 74, extends this to dwellings for the working classes.)

(xi.) Farm houses, offices, and outbuildings, and other buildings for farm purposes. (See also 53 & 54 Vict. c. 69, s. 13 (2), *post.*)

The building of a house for the residence of the estate agent has lately been held not to be within the Acts; nor the building of new stables, the existing stables being inconvenient and insufficient.^(a)

(xii.) Saw mills, scutch mills, and other mills, water wheels, engine houses and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise.

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption.

(xiv.) Tramways, railways, canals, docks.

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea or tidal waters, for facilitating transport of persons and agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals and things required for mining purposes.

(xvi.) Markets, and market places.

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land.

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid.

(xix.) Trial pits for mines and other preliminary works necessary or proper in connection with development of mines.

(xx.) Reconstruction, enlargement, or improvement of any of those works.

The erection of a new pumping engine and pumps for draining some mines included in the settlement, were held to be within the above subsections.^(b)

(a) *Re Lord Gerard's S. E.*, (1893) 3 Ch. 252; 63 L. J. 23, Ch.; 69 L. T. Rep. N. S. 393, disapproving of *Re Houghton*, 30 Ch. Div. 102.

(b) *Re Mundy's S. E.*, (1891) 1 Ch. 399; 63 L. T. Rep. N. S. 311; 39 W. R. 209.

By the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, improvements authorised by the Act of 1882 are to include :—

(1) Bridges.

(2) Making any additions to or alterations in buildings reasonably necessary or proper, to enable the same to be let.

(3) Erection of buildings in substitution for buildings within an urban sanitary district, taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof.

(4) Rebuilding of the principal mansion house on the settled land ; but the sum to be applied under this sub-section is not to exceed one half of the annual rental of the settled land.

The Settled Land Acts contain a code of rules, and capital money can only be applied as they direct.(a)

Under sect. 13 (2) of the Act of 1890 there must be a present intention to let, if not an immediate prospect of letting, or the sub-section does not apply.(b) A new roof or new entrance to a house is within its provisions, but not a boiler and pipes for interior heating.(c)

A "rebuilding" of the principal mansion house under sect. 13 (4) does not include mere architectural embellishment.(d)

In estimating the half of the annual rental of the settled land for the purposes of sect. 13 (4), the rental of the whole of the land in settlement must be taken into account.(e) And the income arising from capital money invested should be included.(f)

By the Act of 1882, sect. 31, sub-sect. 1 (v.), the tenant for life may enter into a contract relating to the execution of any improvement authorised by the Act, and may vary or rescind the same.

Where the tenant for life desires that capital money arising under the Act shall be applied in payment of any improvement authorised by the Act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon (Act 1882, sect. 26, sub-sect. 1).

If the capital money is in the hands of trustees, they may, after approval of the scheme, apply the money in or towards payment of the whole or part of any work or operation comprised in the improvement on (1)

(a) *Re Lord Gerard's S. E.*, (1893) 3 Ch. 252 ; 69 L. T. Rep. N. S. 393 ; 63 L. J. 23, Ch.

(b) *Re De Teissier's S. E.*, (1893) 1 Ch. 153 ; 62 L. J. 552, Ch. ; 68 L. T. Rep. N. S. 275 ; 41 W. R. 184.

(c) *Re Gaskell's S. E.*, (1894) 1 Ch. 485 ; 63 L. J. 243, Ch. ; 70 L. T. Rep. N. S. 554 ; 42 W. R. 219.

(d) *Re Lord Gerard's S. E.*, sup. ; and see *Re Walker's S. E.*, (1894) 1 Ch. 189, 192 ; 63 L. J. 314, Ch. ; 70 L. T. Rep. N. S. 259.

(e) *Re Lord Gerard's S. E.*, sup. ; *Re Walker's S. E.*, sup.

(f) *Re De Teissier's S. E.*, sup.

a certificate of the Board of Agriculture^(a) certifying that the work or operation, or a specified part thereof, has been properly executed and what amount is properly payable in respect thereof, which certificate is a conclusive authority and discharge to the trustees for the payment; or (2) on a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Board, or by the court, which certificate is to be conclusive as aforesaid; or (3) on an order of the court directing the trustees to so apply a specified portion of capital money (sub-sect. 2).

Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, on one of the above certificates approved by the court, or on such other evidence as it thinks sufficient, make such order and give such directions as it thinks fit for the application of the money, or any part thereof, in or towards payment of the improvement made (sub-sect. 3).

By the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15, the court may make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, notwithstanding that a scheme was not, before its execution, submitted for approval to the trustees of the settlement or to the court.

The cost of improvements executed since the Act of 1882 is within the above section; but the court will not direct that the tenant for life shall be repaid out of the capital money sums paid for improvements executed before the Act of 1882.^(b)

By sect. 27 of the Act of 1882, the tenant for life may join or concur with any other person interested in executing any improvement authorised by the Act, or in contributing to the cost thereof.

By sect. 28 of the Act of 1882 the tenant for life and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, must, during any period prescribed by the Board of Agriculture by certificate, maintain and repair at his own expense the improvements executed under the Act; and where a building or work in its nature insurable against damage by fire, is comprised in the improvement, insure and keep insured the same, at his own cost, in such amount, if any, as the Board by certificate prescribe (sub-sect. 1). And he must not cut down, &c., except for proper thinning, any trees planted as an improvement under the foregoing provisions of the Act (sub-sect. 2). And he may be required by the Board to report to them the state of the improvements, and particulars of the fire insurance (sub-sect. 3). And if he fails to comply with the requisites of the section, or does any act in contravention thereof, any person having an estate or interest under the

(a) Formerly the Land Commissioners for England. By sect. 49 this certificate must be filed in the office of the Land Commissioners. An office copy thereof may be obtained, which is sufficient evidence of the certificate. The 52 & 53 Vict. c. 30, substituted the Board of Agriculture for the Land Commissioners (sects. 2, 10).

(b) *Re Ormrod's S. E.*, (1892) 2 Ch. 318; 61 L. J. 651, Ch.; 66 L. T. Rep. N. S. 845; 40 W. R. 490; and see *Re Marquis of Bristol's S. E.*, (1893) 3 Ch. 161, ante, p. 433.

settlement in possession, remainder, or reversion in the settled land, has a right of action against the tenant for life; and his estate after his death is liable in damages for such default or act (sub-sect. 5). The Board may vary the certificate, but not so as to increase the liabilities of the tenant for life, or his successor (sub-sect. 4).

By the Settled Land Act, 1887 (50 & 51 Vict. c. 30), any improvement in payment for which capital money is applied, &c., under the provisions of sect. 1 of this Act (*ante*, p. 432) is to be deemed to be an improvement within sect. 28 of the Act of 1882 (*supra*), and the provisions thereof are, so far as applicable, to be deemed to apply to such improvement (sect. 2).

By sect. 29 of the Act of 1882 such tenant for life or successor as aforesaid, and all persons employed by him, may from time to time enter upon the settled land, and without being impeachable for waste by the remainderman or reversioner, execute any improvement authorised by the Act, or inspect, maintain, and repair the same, and do all necessary acts therein, and work freestone, limestone, clay, &c., make tramways, burn bricks, &c., and cut down and use timber and trees not planted or left standing for shelter or ornament.

As to timber, the Act provides that where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, he may, with the consent of the trustees of the settlement, or an order of the court, cut and sell such timber. But three-fourth parts of the net proceeds of the sale must be set aside as capital money arising under this Act, and the other fourth part go as rents and profits (sect. 35; see also *supra*, *et ante*, p. 416).

Sect. 37 enables the tenant for life, with an order of the court, to sell heirlooms which are settled on trust so as to devolve with the land until a tenant in tail by purchase is born, or attains twenty-one, &c. The money arising from the sale is to be capital money arising under the Act, and to be invested or applied accordingly, or, with a like order, may be invested in the purchase of other chattels of the same or any other nature, to be settled and held on the same trusts, &c., as the chattels sold.

The proceeds of sale of chattels under the section may be applied in discharge of incumbrances on the inheritance.(a)

Such are the powers given to a tenant for life or other persons having the powers of a tenant for life to sell, exchange, make partition, mortgage, charge and improve, &c., settled land, under the Settled Land Acts; which, as already stated (*ante*, p. 291, also *post*), cannot be assigned or released. The ordinary powers of sale, &c., formerly inserted in settlements of realty may now, therefore, be omitted.

If at any time a difference arises between the tenant for life and the trustees of the settlement respecting the exercise of any of the powers of the Acts, or of any matter relating thereto, the court may, on the application of either party, give directions respecting the matter in difference, and the costs of the application (sect. 44). In the case of

(a) *Re Duke of Marlborough*, 32 Ch. Div. 1; 55 L. J. 339, Ch.; 54 L. T. Rep. N. S. 914.

applications under this section notice thereof must be served on the tenant for life or on the trustees, as the case may be (Settled Land Act Rules, Dec. 1882, r. 4).

Where any provision in the Act refers to sale, purchase, exchange, partition, leasing or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, &c., the same is to extend only (unless it is otherwise expressed) to sales, &c., under this Act (sect. 55, sub-sect. 3).

However, by the Act of 1884, that Act and the Act of 1882 are to be construed together (sect. 3); a similar provision is contained in the Act of 1887 (sect. 3); and in the Act of 1890 (sect. 2).

We have already (*ante*, p. 292) shown what persons besides a tenant for life have, under the Settled Land Act, 1882, the powers of a tenant for life. The Act also provides that, where a person who in his own right is seised of or entitled in possession to land is an infant, then for the purposes of this Act the land is settled land, and the infant deemed tenant for life thereof (sect. 59). It has been held that where the infant is only contingently entitled, the estate cannot be sold under this Act.^(a)

And by sect. 60, where a tenant for life, or a person having the powers of a tenant for life, is an infant, &c., the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person, and in such manner as the court, on application by the infant's guardian or next friend, orders.

Where persons have been appointed under sect. 60 to sell the settled estate, they can make a good title without trustees being appointed under sect. 38, to whom notice of the intended sale can be given under sect. 45; but the order should direct the purchase money to be paid into court.^(b)

The foregoing provisions of the Act do not apply to a married woman (sect. 61, sub-sect. 1); but where a married woman who, if single, would have been tenant for life, &c., is entitled for her separate use, or under any statute for her separate property, or as a *feme sole*,^(c) then she, without her husband, is to have the powers of a tenant for life under the Act (sub-sect. 2). Where she is entitled otherwise, then she and her husband together are to have the powers of a tenant for life under the Act (sub-sect. 3). And the provisions of the Act referring to a tenant for life, a settlement, and settled land, are to apply accordingly (sub-sect. 4). And the married woman may execute and do all deeds and things necessary or proper for giving effect to the section (sub-sect. 5). A restraint on anticipation in the settlement is not to prevent her exercising any power under the Act (sub-sect. 6).

The powers of transfer of a married woman over her real estate, both jointly with her husband and as a *feme sole*, have already been considered.^(d)

(a) *Re Horne's S. E.*, 39 Ch. Div. 84; 57 L. J. 790, Ch.; 59 L. T. Rep. N. S. 580; 37 W. R. 69.

(b) *Re Countess of Dudley*, 35 Ch. Div. 338; 57 L. T. Rep. N. S. 10; 56 L. J. 478, Ch.; 35 W. R. 492.

(c) See *ante*, pp. 13 to 15, 403, 404, 407, 409.

(d) See *ante*, pp. 15 to 21.

By sect. 62, where a tenant for life, &c., is a lunatic so found by inquisition, his committee may, under an order of the Lord Chancellor or other person entrusted by the Queen's sign manual with the care and commitment of the persons and estates of lunatics, exercise in his name and on his behalf the powers of a tenant for life under the Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

The Act does not apply to a sale in the case of a lunatic not so found by inquisition.^(a) But if the settlement contains a power enabling the tenant for life to sell the estate and he becomes lunatic, though not so found, a person may be authorised to execute the power of sale under the Lunacy Act, 1890, ss. 116, 120, 128.^(b)

By sect. 50, the powers under the Act of a tenant for life cannot be assigned or released, and do not pass, either by operation of law or otherwise, to his assignee, but remain exercisable by the tenant for life notwithstanding any such assignment of, or any charge on, his estate or interest under the settlement (sub-sects. 1, 4). And a contract by him not to exercise his powers is void (sub-sect. 2). But the rights of an assignee for value of the estate or interest of the tenant for life cannot be affected without such assignee's consent; yet, unless he is actually in possession of the settled land, or part of it, his consent is not requisite for making a lease by the tenant for life, made at the best rent, without fine, and in other respects in conformity with the Act (sub-sect. 3).

The effect of sect. 50 is that the statutory power of sale given to the tenant for life is not annexed to his estate, but is vested in him once for all by the Act, notwithstanding any assignment of his estate.^(c)

An assignment, either before or after the Act, and by way of mortgage, &c., is included in the section (sub-sect. 4). But by 53 & 54 Vict. c. 69, an assignment or charge by the tenant for life of his estate or interest in consideration of marriage or as part of a family arrangement, not being a security for money advanced, is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value (sect. 4). Nor can any provision be inserted in any settlement, will, assurance, or other instrument, executed before or after this Act, prohibiting by declaration, &c., a tenant for life from exercising any power under this Act, or by limitation or gift over of the settled land, or by a limitation or gift of other real or personal property, or by the imposition of any condition, or by forfeiture, &c., and all such attempts are to be deemed to be void (45 & 46 Vict. c. 38, s. 51, sub-s. 1, see also sub-s. 2). And notwithstanding anything in the settlement, the exercise by the tenant for life of any power under the Act will not occasion a forfeiture (sect. 52).

Sect. 51 also applies to a case where the prohibition is contained in a

(a) *Re Baggs*, 63 L. J. 612, Ch.; 71 L. T. Rep. N. S. 138; (1894) 2 Ch. 416 n.; and see *ante*, p. 291, as to the power of granting leases.

(b) *Re X.*, (1894) 2 Ch. 415; 63 L. J. 613, Ch.; 71 L. T. Rep. N. S. 139; 42 W. R. 657.

(c) *Re Mundy and Roper*, (1899) 1 Ch. 275; 68 L. J. 135, Ch.; 79 L. T. Rep. N. S. 583; 47 W. R. 226, C. A.

separate instrument made by a person other than the settlor of the land.(a) So under sect. 51 it has been held that a condition that the tenant for life shall reside on the estate does not prevent him from selling the estate and becoming entitled to the income of the proceeds of the sale during his life.(b) But where the breach of such a condition is by the terms of the settlement to work a forfeiture, then, if no sale takes place, the condition is enforceable.(c)

By sect. 53, a tenant for life in exercising any power under the Act must have regard to the interests of all parties entitled under the settlement, and he is deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Under the above section the tenant for life will be answerable for an improper exercise of the powers conferred upon him by the Act in the same manner as if he were an actual trustee.(d) But the mere fact that the tenant for life will derive a benefit from the exercise of his powers is no objection.(e) And under the Settled Land Act, 1890, s. 12, where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land subject to the limitations of the settlement, the trustees of the settlement are to stand in the place of and represent the tenant for life; and are, in addition to their powers as trustees, to have all the powers of the tenant for life in negotiating and completing the transaction (sect. 12).

Sect. 56 of the Act of 1882 provides that nothing in the Act is to take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute, or otherwise exercisable by a tenant for life, or by trustees with his consent,(f) or on his request, or otherwise; the powers given by the Act being cumulative (sub-sect. 1). But in case of conflict between the provisions of a settlement and of the Act, relative to any matter in respect whereof the tenant for life exercises, or contracts to exercise, any power under the Act, the provisions of the Act are to prevail;(g) and, notwithstanding anything in

(a) *Re Smith*, 68 L. J. 198, Ch.; (1899) 1 Ch. 331; 80 L. T. Rep. N. S. 218; 47 W. R. 357.

(b) *Re Pagett's S.E.*, 30 Ch. Div. 161; 55 L. J. 42, Ch.; 53 L. T. Rep. N. S. 90; 33 W. R. 898.

(c) *Re Haynes*, 37 Ch. Div. 306; 57 L. J. 519, Ch.; 58 L. T. Rep. N. S. 14; 36 W. R. 321.

(d) See *Wheelwright v. Walker* (No. 2), 31 W. R. 912; W. N. (1883), p. 154; *ante*, p. 428; *Hatten v. Russell*, 38 Ch. Div. 384, 345; 51 L. J. 425, Ch.; *Bruce v. Marquis of Ailesbury*, (1892) A. C. 356; *ante*, p. 429; *Hampden v. Earl of Buckingham*, (1898) 2 Ch. 531; *ante*, p. 433.

(e) *Re Lord Stamford*, 56 L. T. Rep. N. S. 484; but see *Chandler v. Bradley*, (1897) 1 Ch. 315, *stated ante*, p. 292.

(f) For instances of powers to be exercised by consent, see *ante*, pp. 27, 427.

(g) See *Re Duke of Newcastle's S. E.* 24 Ch. Div. 129; 48 L. T. Rep. N. S. 780; 31 W. R. 782; *Re Chaytor's S. E.* 25 Ch. Div. 651; 53 L. J. 312, Ch.; 32 W. R. 517.

the settlement, the consent of the tenant for life, or, in the case of a settlement not within sect. 63 (*post*), when two or more persons together constitute the tenant for life, the consent of any one of them is necessary to the exercise by the trustees of the settlement, &c., of any power conferred by the settlement exercisable for any purpose provided for in the Act (sub-sect. 2; 47 & 48 Vict. c. 18, s. 6, sub-s. 2). And if a question arises or a doubt is entertained respecting any matter within the section, the decision, opinion, or direction of the court may be obtained thereon (Act, 1882, sub-sect. 3).

The settlor may confer on the tenant for life, or on the trustees of the settlement, additional or larger powers than those conferred by the Act (sect. 57); but if given to the trustees they must not conflict with the provisions of the Act, as the Act is to prevail (*supra*).

Matters within the jurisdiction of the court under the Act are assigned to the Chancery Division of the court (sect. 46, sub-sect. 1). Applications may be made to the court by petition or summons (sub-sect. 3); but if made by petition without the direction of the judge, no further costs are to be allowed than would be allowed upon summons (Settled Land Act Rules, December, 1882, r. 2). On an application by the trustees, notice must in the first instance be served on the tenant for life (45 & 46 Vict. c. 38, s. 46 (4); Settled Land Act Rules, 1882, r. 4). On any application under the Act it is sufficient to verify by affidavit the title of the tenant for life, and trustees, or other persons interested in the application, unless the judge requires further evidence (Settled Land Act Rules, December, 1882, r. 7).

By sub-sect. 8 of sect. 46, the Court of Chancery of the county palatine of Lancaster may also exercise the powers of the court as regards land in that county.

Sub-sect. 10 extends the exercise of the powers of the court as regards land not exceeding in capital value 500*l.*, or 30*l.* in annual rateable value, and as regards capital money arising under the Act and securities, and personal chattels settled, not exceeding in value 500*l.*, to the County Courts.

Settlement by way of trust for Sale.

It yet remains to notice the provisions of sect. 63 of the Settled Land Act of 1882, as amended by the Act of 1884 (47 & 48 Vict. c. 18), as to settlements by way of trust for sale. By sect. 63 where any land or any estate therein which by any deed, will, Act of Parliament, or other instrument or instruments, is subject to a trust or direction for sale, and the application of the proceeds, or income thereof, or the income of the land until sold, for the benefit of any person for life or other limited period, whether absolutely or not, it is to be deemed to be settled land; and the instrument or instruments a settlement; and the person beneficially entitled to the income, the tenant for life thereof; and the persons who are under the settlement trustees for sale, or have power of consent thereto, &c., or if none, then the persons, if any, who are by the settlement declared to be trustees thereof for purposes of the Act, are for such purposes trustees of

the settlement (sub-sect. 1). And the provisions of the Act as to a tenant for life, a settlement and settled land, are to extend to the persons aforesaid, the instrument or instruments and the land therein comprised, except that (i.) any reference in the Act to predecessors or successors in title of the tenant for life or the remaindermen or reversioners, &c., is to be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land or the income thereof, or the income of the land until sale. (ii.) Capital money arising from the settled land is not to be applied in the purchase of land unless so authorised by the settlement, &c., but may, in addition to any other mode authorised by the Act, be applied in any mode in which capital money arising under the settlement from any such sale, &c., is applicable thereunder, subject to any consent required by the settlement. And (iii.) capital money arising from the settled land and the securities in which the same is invested, is not, for any purpose of disposition, or devolution, to be considered as land, unless, if arising under the settlement, it would have been so considered, &c. (iv.) Land acquired by purchase, exchange, or partition, is to be vested in the trustees of the settlement on the trusts, &c., which, under the settlement, &c., are subsisting with respect to the settled land, or would be so if not sold, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging (sub-sect. 2).

Sect. 63 was held to prevent trustees for sale from selling without the consent of the tenant for life of the proceeds, where the power of sale was only *discretionary*, but not where the trust for sale was absolute.^(a) And by 47 & 48 Vict. c. 18, s. 6, in case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the settlement is not by force of anything in that Act to be necessary to enable the trustees to execute any of the trusts or powers created by the settlement (sub-sect. 1).

The trustees are *prima facie* the proper persons to exercise the above power of sale, but by sect. 7 of 47 & 48 Vict. c. 18 (i.) the powers conferred by sect. 63 of the Act of 1882 are not to be exercised without the order of the court; (ii.) which is to name the person to whom leave is given; and (iv.) then he is the only person who is to execute any trust or power created by the settlement, for any purpose for which leave is given, to exercise a power conferred by the Act of 1882. (v.) The order may be registered as a *lis pendens* against the trustees of the settlement named in the order, describing them as "trustees for the purposes of the Settled Land Act, 1882"; and (vi.) any person dealing with the trustees, &c., will not be affected by the order unless and until it is so registered. (vii.) The tenant for life may apply for the order; but (viii.) the trustees or any beneficiary under the settlement may also apply to have it varied or rescinded (sect. 7).

Where land was held upon trust for sale, without any trusts prior to

(a) *Taylor v. Poncia*, 25 Ch. Div. 646, 650; 50 L. T. Rep. N. S. 20; 32 W. R. 335.

the interest of the tenant for life, leave was given to him to sell.^(a) Ordinarily, however, the tenant for life does not require the powers given by sect. 63 of the Act of 1882, as already shown.

The Settled Estates Act, 1877.

The Settled Land Act, 1882, does not repeal the Settled Estates Act, 1877, with the exception of sect. 17, but it has in most cases been rendered obsolete by the Act of 1882; however, it may still be useful in cases not falling within the Settled Land Act, 1882. We, therefore, propose briefly to notice the sections of the Settled Estates Act which apply to sales of settled land, the effect of the statute as to leases having already been given.^(b)

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the former statutes, relating to the sale and leasing of settled estates under the sanction of the Chancery Division of the High Court, are repealed and re-enacted by this statute, with certain additions and amendments.

The Act authorises the court, if the court deems it proper and consistent, to order a sale of any settled estates, or of any timber, not ornamental timber, growing thereon (sect. 16). Minerals may be excepted from the sale (sect. 19). The money raised on any such sale, &c., is to be paid either to trustees of whom the court shall approve, or into court, and is to be applied either to the redemption of the land tax, or of any incumbrance affecting the hereditaments sold, or any other hereditaments settled in the same way, or the purchase of other hereditaments to be settled in the same manner, or in the payment to any person becoming absolutely entitled (sect. 34); or it may be applied as capital money arising under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32. The money is in the meantime to be invested in some or one of the investments in which cash under the control of the court is for the time being authorised to be invested, and the interest and dividends paid to the person entitled. But the powers of the Act are not to be repeatedly exercised if an express declaration to the contrary is contained in the settlement (40 & 41 Vict. c. 18, ss. 36, 38).

And by the 44 & 45 Vict. c. 41, s. 41, where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land is to be deemed to be a settled estate within the Settled Estates Act, 1877.

On a sale the court may, by 40 & 41 Vict. c. 18, direct what person or persons are to execute the deed of conveyance, which takes effect as if executed under a power in the settlement (sect. 22).

The application for leave may be made by petition by the person entitled to possession, &c., of any settled estates for a term of years determinable on his death, or for an estate for life, or for any greater estate, or by the assignee of such person (sect. 23); with the consent of

(a) *Re Harding*, (1891) 1 Ch. 60; 60 L. J. 277, Ch.; 63 L. T. Rep. N. S. 539: 39 W. R. 113.

(b) See *ante*, pp. 284, 285.

the persons mentioned in sect. 24 ; subject to the power of the court to dispense with consents (sect. 25). Notice must, however, be given to persons who do not concur in, or consent to, the application (sect. 26), unless this be dispensed with by the court under sects. 27 and 28. Effect may be given to an application subject to the rights and interests of non-consenting parties (sect. 29). Notice of any application under the Act is to be served on trustees, &c. (sect. 30).

All powers given by the Act and all applications to the court, and consents to and notifications respecting such applications may be executed, made, or given by, and all notices under the Act may be given to guardians of infants, and by or to committees of lunatics, or trustees of the property of bankrupts ; save that in the case of infant or lunatic tenants in tail, no such application or consent may be made or given without the special direction of the court (sect. 49).

If a married woman applies to the court or consents to an application thereto, she must, if she does not come within the provisions of the Married Women's Property Act, 1882, (a) be first separately examined as to her free desire to make, or consent to, the application ; even if the property is settled to her separate use, &c. (sect. 50). But no separate examination is necessary if she comes within the provisions of the above Act. (b)

Trustee Clauses, &c.

It has already been shown in detail (c) that recent legislation has rendered the following powers and trusts formerly inserted in settlements in all ordinary cases to be unnecessary : (1) to distrain for the wife's jointure ; (2) to provide for the maintenance of younger children ; (3) to receive rents and manage the settled estates during minorities ; (4) to sell, exchange, enfranchise or make partition of the settled lands ; and (5) to give receipts for purchase moneys.

There yet remains for consideration the following trustee clauses : (1) the power of investment of the trust moneys ; (2) the power to compound and settle claims ; (3) the power to appoint new trustees ; and (4) the proviso for indemnity and reimbursement of trustees.

Transmission of Trusts and Powers.—Before the operation of the Conveyancing Act, 1881, powers given to trustees named in a settlement were usually expressly given also to the survivors and survivor of them ; and also often to the representatives of the survivor after his death. The effect of giving the powers to the executors or administrators, or the heirs of the original trustees, or the assigns of either, was that without the appointment of new trustees, the powers might be exercised by the persons who answered such description. (d)

As to whether a trust or power survived prior to the operation of the Conveyancing Act, 1881, without express words, it may be briefly stated that a trust as distinguished from a mere power is said to descend with or

(a) *Ante*, p. 15.

(c) *See ante*, p. 425, *et seq.*

(b) *Ante*, p. 20.

(d) *See Vaizey, Settl.* 346.

follow the estate, and is exercisable by the person or persons on whom the estate devolves by law. Thus, where an estate was devised to A. and B. and their heirs on trust to sell, it was held that the survivor of A. and B., or the heir of the survivor, could sell.(a) But a mere or arbitrary power, independent of a trust, given before 1882, will be construed strictly. Thus, if for instance trustees by name have a power of revoking limitations and shifting property into a different channel, the discretion is evidently meant to be personal, and not to be annexed to the estate or office.(b)

By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22, however, replacing sect. 38 of the Conveyancing Act, 1881, when a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, the same may be exercised or performed by the survivors or survivor of them for the time being (sub-sect. 1). But this only applies to trusts coming into operation after 31st December, 1881.

Again, when a trust is limited to a trustee and his heirs, he cannot delegate the trust by Act *inter vivos* ;(c) except under a power of appointing new trustees, contained in the trust instrument, or arising under the statutory power,(d) and with some other exceptions, to be noticed subsequently. Whether before 1882, if a trust for sale be given to several trustees and their heirs (omitting "and assigns"), the *devisee* of the last surviving trustee could exercise the power is not very clear. In *Cook v. Crawford* (e) it was held that he could not do so. But in a later case it was decided otherwise.(f) However, in *Re Morton and Hallett*,(g) Baggallay, L.J., said, "I am not prepared to dissent from *Cooke v. Crawford*." (h)

It must also be remembered that an absolute trust for sale of realty operates as a conversion of the property ;(i) as will be more fully shown *post*.(k)

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, where an estate of inheritance, or limited to the heir as special occupant, in any tenements is vested on any trust in any person solely, the same on his death, notwithstanding any testamentary disposition, becomes vested in his personal representatives, as if the same were a chattel real, with power for one or all of such personal representatives to deal with the same ; and for the purposes of the section the personal representatives of the deceased are to be deemed in law his heirs and assigns within the meaning of all trusts and powers.

(a) *Re Morton and Hallett*, (1880) 15 Ch. Div., 143 ; 49 L. J. 559, Ch. ; 42 L. T. Rep. N. S. 602 ; 28 W. R. 895 ; Lewin, Trusts, 715, 726, 10th edit.

(b) Lewin, Trusts, 715, 728, 10th edit. ; Sug. Pow. 126, 8th edit.

(c) *Bradford v. Belfield*, 2 Sim. 264 ; and see *Re Rumney and Smith*, (1897) 2 Ch. 351.

(d) See 2 Prid. Conv. 185, 17th edit.

(e) 13 Sim. 91.

(f) *Osborne to Rowlett*, 13 Ch. Div. 774 ; 49 L. J. 310, Ch.

(g) *Supra*.

(h) See also *Titley v. Wolstenholme*, 7 Beav. 425 ; *Mackdonald v. Walker*, 14 Id. 556 ; *Hall v. May*, 3 K. & J. 585.

(i) *Goodier v. Edmunds*, (1893) 3 Ch., 455 ; 62 L. J. 649, Ch.

(k) See *post*, tit. "Wills."

The section applies only in cases of death after the commencement of the Act.

It will be noticed that this section applies where an estate or interest "is vested on any trust;" therefore, a mere power unaccompanied by an estate or interest is not apparently within the section.

By the Copyhold Act, 1894, the above section is not to apply to copyhold or customary lands vested in the tenant on the court rolls on trust or by way of mortgage (sect. 88).^(a)

And as already fully shown, by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), in case of a death after 31st December, 1897, where any real estate is vested in any person without a right in any other person to take by survivorship, it, on his death, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representatives as if it were a chattel real. This is to apply to real estate over which a person has a general power of appointment which he exercises by will; but not to copyholds requiring admission to complete a purchaser's title (sub-sects. 1, 2, 4). The personal representatives hold the estate as trustees for the persons beneficially entitled thereto, who may require a transfer thereof, under the circumstances and after the time already^(b) detailed (sects. 2, 3, sub-sect. 2). Such real estate is assets in the hands of the personal representatives, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate are to apply to real estate, as if it were a chattel real vesting in them; except that it is not to be lawful for some or one only of several joint representatives, without the authority of the court to sell or transfer real estate (sect. 2, sub-sect. 2; *et ante*, p. 30). And it has been held that the realty vests in all the executors named, and not merely in those who prove the will, and all must join in conveying the legal fee simple thereof.^(c)

Investment Clause.—It has already (*ante*, p. 431) been shown that capital money arising under the Settled Land Act, 1882, may (*inter alia*) be invested on government securities, or on other securities on which trustees are authorised by law to invest trust money. So a settlement may include money or stock, as well as land, and provision should be made for its investment, and for varying the investments, usually with the written consent of husband and wife during their joint lives and then of the survivor of them, and after the death of the survivor at the discretion of the trustees.

An infant wife can exercise a power of consenting to a change of investment where such an intention appears.^(d)

The Trustee Act, 1893 (56 & 57 Vict. c. 53), replaces the Trustee Act, 1889, and makes provision for the investment of trust funds. Before

(a) This section replaces sect. 45 of the Copyhold Act of 1887 to the same effect, and as to the construction put upon it, see *Re Mills*, 37 Ch. Div. 312, stated *ante*, pp. 26, 67.

(b) *Ante*, pp. 29, 30.

(c) *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58; 69 L. J. 6, Ch.

(d) *Re Cardross*, 7 Ch. Div. 728; see also *Re D'Angibeau*, 15 Ch. Div. 228.

enumerating the investments authorised by the Act, it will be better to define trustee according to that Act. By sect. 50, "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person; but not duties incident to an estate conveyed by way of mortgage.

As to investments, by sect. 1 a trustee may, unless expressly forbidden by the trust instrument, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(A) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom;

(B) On real or heritable securities in Great Britain or Ireland (see *ante*, p. 190; and sect. 5, *post*);

(C) In the stock of the Bank of England or the Bank of Ireland;

(D) In India three and half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India;

(E) In any securities the interest of which is guaranteed by Parliament;

(F) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the receiver for the metropolitan police district;

(G) In the debenture or rent charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock;

(H) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (G), either alone or jointly with any other railway company;

(I) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India;

(J) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company;

(K) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

(L) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having for each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock ;

(M) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the last census returns, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order ;

(N) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for supplying water, and having a compulsory power of levying rates over an area having, according to the last census returns, a population exceeding fifty thousand, provided that during each of the ten years last past the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied ;

(O) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court, and may also from time to time vary any such investment.

By sect. 2 a trustee may, under the powers of the Act, invest in any of the securities mentioned or referred to in sect. 1 of the Act, although the same may be redeemable, and the price exceeds the redemption value (sub-sect. 1). But he may not purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (G), (I), (K), (L), and (M) of sect. 1, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate (sub-sect. 2). But he may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of the Act (sub-sect. 3).

By sect. 3 the above powers are to be exercised according to the discretion of the trustee, but subject to any consent required by the trust instrument with respect to the investment of the trust funds. And by sect. 4 the preceding sections are to apply as well to trusts created before as after the passing of the Act, and the powers thereby conferred are to be in addition to the powers conferred by the trust instrument.

By sect. 5 a trustee having power to invest in real securities, unless expressly forbidden by the trust instrument, may invest and shall be deemed to have always had power to invest :

(A) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent ; and

(B) On any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864 (sub-sect. 1).

A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the trust instrument, invest in the debenture stock of a railway company or such other company as aforesaid (sub-sect. 2). And having power to invest in the debentures or debenture stock of any railway or other company, he may, unless the contrary is expressed in the trust instrument, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875 (sub-sect. 3). And having power to invest in securities in the Isle of Man, or in securities of the government of a colony, he may, unless the contrary is expressed in the trust instrument, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880 (sub-sect. 4). And having a general power to invest upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865 (sub-sect. 5).

By sect. 6 a trustee having power to invest in the purchase of land or on mortgage of land may do so, notwithstanding the same is charged with a rent under the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

By sect. 7, a trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of the India Stock Certificate Act, 1863; the National Debt Act, 1870; the Local Loans Act, 1875; or the Colonial Stock Act, 1877.

It will be noticed that by Clause (c) of sect. 1 of the Act trustees may invest the trust moneys in any of the stocks, &c., authorised for investment of cash under the control of the court. These are specified in Ord. 22, r. 17 (November, 1888, as amended by an order of 10th February, 1897; and of October, 1899) of R. S. C.; and are,

In two and three-quarters per cent. consolidated stock (to be called after the 5th of April, 1903, two and a half per cent. consolidated stock);

Two pounds fifteen shillings and two pounds ten shillings per cent. annuities;

Local loans stock under the National Debt and Local Loans Act, 1887;

Exchequer bills;

Bank stock;

India three and a half per cent. stock;

India three per cent. stock;

India guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment;

Stocks of Colonial Governments guaranteed by the Imperial Government;

Mortgage of freehold and copyhold estates respectively in England and Wales ;

Metropolitan consolidated stock, three pounds ten shillings per cent. ;

Three per cent. metropolitan consolidated stock ; and inscribed two and a half per cent. debenture stock of the Corporation of London, 1897.

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock. (Sect. 1 (g) of the Act of 1893 (*supra*) requires three per cent. to be paid on the ordinary stock.)

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, or the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

And by 63 & 64 Vict. c. 62, s. 2, the securities in which a trustee may invest under the powers of the Trustee Act, 1893, are to include any Colonial stock which is registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by this Act, &c. But the restrictions mentioned in sect. 2 (2) of the Trustee Act, 1893 (*ante*, p. 451), with respect to the stocks therein referred to, are to apply to Colonial stock.

It has already been shown (a) what loans and investments by a trustee are not, under the Trustee Act of 1893 (sects. 8 and 9) and the Amendment Act of 1894 (sect. 4), to be chargeable as breaches of trust. Further, by 59 & 60 Vict. c. 35, s. 3, if it appears to the court that a trustee is or may be personally liable for any breach of trust, occurring before or after this Act, but who has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the court in the matter, the court may relieve him from personal liability for the same.

In order that a trustee may obtain relief under the above section the burden lies upon him of showing that he has acted both honestly and reasonably in the matter in question ; the mere fact that he acted honestly is not sufficient. (b)

An executor who has committed a *devastavit* is within the provisions of the above section. (c)

Irrespective of legislative enactment, a trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. And for such purpose he may employ agents in cases in which they are employed in the ordinary course of business. (d)

Therefore he may employ a broker to assist in making an investment ;

(a) *Ante*, pp. 190, 191.

(b) *Re Turner*, (1897) 1 Ch. 536 ; 76 L. T. Rep. N. S. 116 ; 45 W. R. 495 ; *Re Stuart*, 66 L. J. 780, Ch. ; (1897) 2 Ch. 583 ; 46 W. R. 41 ; 77 L. T. Rep. N. S. 128 ; *Re Barker*, 77 L. T. Rep. N. S. 712 ; 46 W. R. 296.

(c) *Re Kay*, (1897) 2 Ch. 518 ; 66 L. J. 759, Ch. ; 46 W. R. 74.

(d) *Speight v. Gaunt*, 22 Ch. Div. 727 ; 9 App. Cas. 1 ; 53 L. J. 419, Ch. ; 32 W. R. 435 ; *Whiteley v. Learoyd*, 33 Ch. Div. 347 ; 12 App. Cas. 727.

and if the broker misapplies the money entrusted to him for this purpose the trustee is not liable.(a) But the trustee must exercise proper care in the selection of a broker, and where he employed an "outside" broker, that is, one who is not a member of the Stock Exchange, who applied part of the fund to his own use, it was held that the trustee was liable to refund the amount for the above reason.(b) And in a previous case, where a trustee had placed trust funds in the hands of his solicitor for investment, which the solicitor misapplied, the trustee was held liable.(c) Also, where he employed the mortgagor's solicitor, and did not take other proper precautions.(d)

By the Trustee Act, 1893 (56 & 57 Vict. c. 58), s. 17, a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration receivable by the trustee under the trust by permitting the solicitor to have the custody of and to produce a deed containing such a receipt as is referred to in sect. 56 of the Conveyancing Act, 1881 (sub-sect. 1), as already(e) shown. So he may appoint a banker or solicitor to be his agent to receive and give a discharge for money payable to the trustee under a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy with a receipt signed by the trustee (sub-sect. 2). And neither agency is to constitute a breach of trust, unless he permits the money or valuable consideration to remain in the hands or under the control of the banker or solicitor for a longer period than is necessary to enable him to pay or transfer the same to the trustee (sub-sect. 3). This section applies only where the receipt is after 24th December, 1888 (sub-sect. 4), as it replaces sect. 2 of the Trustee Act of 1888.

By the Trustee Act of 1893, sect. 45 (replacing sect. 6 of the Trustee Act of 1888), where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, though the beneficiary be a married woman entitled for her separate use and restrained from anticipation, make an order impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee, or person claiming through him (sub-sect. 1). The section applies to breaches of trust committed both before and after the Act, but so as not to prejudice any question in any proceeding pending on 24th December, 1888 (the date of the Trustee Act of 1888).

The words "in writing" apply only to "consent" and not to "instigation or request," which may be verbal;(f) even in the case of a married woman restrained from anticipation.(g) But it must be shown that the

(a) *Speight v. Gaunt*, sup.

(b) *Robinson v. Harkin*, (1896) 2 Ch. 415; 65 L. J. 773, Ch.

(c) *Bostock v. Floyer*, L. R., 1 Eq. 26; 35 L. J. 23, Ch.

(d) *Sutton v. Wilders*, L. R., 12 Eq. 373; 41 L. J. 30, Ch.

(e) See *ante*, p. 151.

(f) *Griffiths v. Hughes*, (1892) 3 Ch. 105; 61 L. J. 264, Ch.; 66 L. T. Rep. N. S. 760; 40 W. R. 524.

(g) *Bolton v. Curre*, (1895) 1 Ch. 544; 64 L. J. 164, Ch.; 71 L. T. Rep. N. S. 752; 43 W. R. 521.

beneficiary was aware that a breach of trust would result from the request or consent being acted upon.^(a)

And for the further protection of trustees, as already^(b) shown, in any action or proceeding against a trustee, except where the claim is founded on any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by him or previously received by him and converted to his use, he may plead any statute of limitations as a bar to such action proceeding, &c.

Compounding Debts, &c.—The clause sometimes inserted in settlements of personalty enabling trustees to compound debts, &c., and allow time for payment is generally rendered unnecessary, such powers being now conferred upon trustees by statute; but we shall refer to this more fully *post*, and under tit. "Wills."

Appointment of New Trustees.—The appointment of new trustees may be effected (1) under an express power to that effect contained in the trust instrument, or (2) under the provisions of sect. 10 of the Trustee Act, 1893, or (3) by an order of the court.

1. If the appointment is to be made under an express provision contained in the settlement, then the power will be confined to the events therein specified.^(c)

2. By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, where a trustee, either original or substituted, and whether appointed by a court or otherwise, is (1) dead, or (2) remains out of the United Kingdom for more than twelve months, or (3) desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or (4) refuses or is unfit to act therein, or (5) is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the trust instrument, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, &c., as aforesaid (sub-sect. 1).

On the appointment of a new trustee for the whole or any part of trust property (A) the number of trustees may be increased; and (B) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part thereof, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and (C) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed,

(a) *Re Somerset*, (1894) 1 Ch. 231; 63 L. J. 41, Ch.; 69 L. T. Rep. N. S. 744; 42 W. R. 145; *Bolton v. Curre*, *sup.*

(b) *Ante*, p. 394.

(c) See *Re Wheeler and Rochow*, (1896) 1 Ch. 315; 65 L. J. 219, Ch.; 73 L. T. Rep. N. S. 661; 44 W. R. 270.

or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and (D) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done (sub-sect. 2).

Every new trustee so appointed, as well *before as after* all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the trust instrument (sub-sect. 3).

The above provisions relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of the section (sub-sect. 4).

The section applies only if and as far as a contrary intention is not expressed in the trust instrument, and is to have effect subject to the terms of that instrument (sub-sect. 5). It also applies to trusts created either before or after the commencement of the Act (sub-sect. 6).

The foregoing section replaces sect. 31 of the Conveyancing Act of 1881; sect. 5 of the Conveyancing Act of 1882; and sect. 6 of the Conveyancing Act of 1892.

Since the operation of the Conveyancing Act, 1881, it has not been usual to insert in settlements a provision for the appointment of new trustees, as was the practice before that Act, except by nominating some person or persons for the purpose of exercising the statutory power of making such appointment, who usually are the husband and wife jointly during their joint lives, and the survivor of them during his or her life, the power being left after the death of the survivor to be exercised by the persons indicated by the statute.

It will be noticed that sub-sect. 1 expressly enables a trustee to retire from all or *any* of the trusts. It was not clear that he could do so before.(a)

The section includes a disclaimer. If the trustee has not acted in the trust and does not intend to do so, he should execute a disclaimer. Although there is no rule that a trustee must disclaim within any particular time, he should do so without delay.(b)

It has been held that where freehold land was devised to a trustee, a disclaimer of the trusts might be by conduct as well as by deed.(c) Yet the disclaimer should properly be by deed,(d) and be a mere disclaimer,

(a) See and compare *Savile v. Couper*, 36 Ch. Div. 520; 56 L. J. 980, Ch.; and *Re Moss*, 37 Ch. Div. 513, 516.

(b) *Lewin on Trusts*, 210, 10th edit.

(c) *Birchall v. Ashton*, 40 Ch. Div. 436; 60 L. T. Rep. N. S. 369; 37 W. R. 387, C. A.; *Stacey v. Elph*, 1 M. & K. 195.

(d) *Stacey v. Elph*, *sup.*

and not operate by way of *conveyance*, for, as the latter transmits an estate, that has been held to imply a previous acceptance of office.(a)

A disclaimer extends to the whole of the trust estate, legal and equitable; a trustee cannot accept one part of the trust and disclaim another.(b)

A continuing trustee is one who is to continue to act after the completion of an intended appointment of the new trustee, and the concurrence of the retiring trustee is not necessary in the appointment.(c)

It is the proper practice on framing a settlement to rely entirely upon the Act in nominating a person "for the purpose of appointing new trustees," without specifying what events are to give rise to the power; for otherwise the power will be confined to the events and purposes specified. Thus, where husband and wife or the survivor were empowered to appoint new trustees in certain specified events, including that of a trustee becoming incapable, but not of becoming unfit, it was held on a trustee becoming unfit, that the appointment of a new trustee could not be made by the surviving husband, but by the continuing trustee under the Act.(d)

If a trustee becomes bankrupt, and has control over trust funds, he is unfit to act.(e)

A trustee who becomes lunatic is incapable of acting; so his incapacity may arise from great age and infirmity.(f)

A power to appoint new trustees given to the tenant for life continues, notwithstanding he has assigned his interest in the trust property.(g)

"Writing" in sub-sect. 1 does not include a will. Therefore, a sole surviving trustee of a will cannot by his will appoint, in continuation to himself, trustees of the will of the original testator.(h)

A donee of the power cannot appoint himself, as the power is a fiduciary one.(i)

Sub-sect. 4 does not enable the personal representatives of a person

(a) *Crewe v. Dicken*, 4 Ves. 97; *Lewin, sup.*

(b) *Birchall v. Ashton, sup.*; *Re Lord and Fullerton*, (1896) 1 Ch. 228; 65 L. J. 184, Ch.; 73 L. T. Rep. N. S. 689; 44 W. R. 195.

(c) *Re Norris*, 27 Ch. Div. 333; 53 L. J. 912, Ch.; *Re Coates to Parsons*, 34 Ch. Div. 370; 56 L. J. 242, Ch.; disapproving of *Re Glenny and Hartley*, 25 Ch. Div. 611; 53 L. J. 417, Ch.; 32 W. R. 457.

(d) *Re Wheeler and De Rochow*, (1896) 1 Ch. 315; 65 L. J. 219, Ch.; 73 L. T. Rep. N. S. 661; 44 W. R. 270.

(e) *Re Barker's Trusts*, 1 Ch. Div. 43; 45 L. J. 52, Ch.; *Re Adams' Trusts*, 12 Ch. Div. 634; 48 L. J. 613, Ch.

(f) *Re Leman's Trusts*, 22 Ch. Div. 633; 52 L. J. 560, Ch.

(g) *Hardaker v. Moorhouse*, 26 Ch. Div. 417; 53 L. J. 713, Ch.; 32 W. R. 638; see also *Re Bedingfield and Herring*, (1893) 2 Ch. 332, 337; 62 L. J. 430; 68 L. T. Rep. N. S. 634.

(h) *Re Parker's Trusts*, (1894) 1 Ch. 707; 63 L. J. 316, Ch.; 70 L. T. Rep. N. S. 165.

(i) *Re Skeats*, 42 Ch. Div. 522; 58 L. J. 656, Ch.; 61 L. T. Rep. N. S. 500; *Re Newen*, (1894) 2 Ch. 297; 63 L. J. 763, Ch.; 70 L. T. Rep. N. S. 653; 43 W. R. 58.

nominated a trustee, but who died before the testator, to appoint a new trustee.(a)

The powers contained in the Trustee Act, 1893, as to the appointment of new trustees and the discharge and retirement of trustees are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890 (sect. 47). This section replaces sect. 17 of the Settled Land Act, 1890.

The costs and expenses attendant on the appointment of a new trustee under a power are usually paid out of the trust estate.(b)

The Act also makes provision for the retirement of a trustee, whether a new trustee be appointed or not. Prior to the Conveyancing Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless (1) the settlement contained an express power enabling him to do so; or (2) by consent of all the *cestui que trusts*, being *sui juris*; or (3) by the authority of the court.(c)

By sect. 11 of the Trustee Act, 1893 (replacing sect. 32 of the Conveyancing Act, 1881), where there are more than *two* trustees, and one of them by *deed* declares that he is desirous of being discharged from the trust, and his co-trustees and any person empowered to appoint trustees, by deed consent to his discharge, and to the vesting in the co-trustees alone of the trust property, then such trustee is to be deemed to have retired from the trust, and is by the deed to be discharged therefrom without any new trustee being appointed in his place. Any assurance or thing requisite for vesting the trust property in the continuing trustees alone is to be executed or done (sub-sects. 1, 2).

The section applies only if and so far as a contrary intention is not expressed in the trust instrument; but it applies to trusts created either before or after the Act (sub-sects. 3, 4).

It will be noticed that at least two trustees must be left to perform the trust, and the co-trustees must consent to the retirement, which must be by deed.

Sect. 12 of the Act makes further provision for the vesting of the trust property, by enacting that where a deed appointing a new trustee to perform any trust contains a *declaration* by the appointor to the effect that any estate or interest in any land or chattel subject to the trust, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right (sub-sect. 1).

Where a deed by which a retiring trustee is discharged under the Act contains such a declaration as above mentioned by the retiring *and con-*

(a) *Nicholson v. Field*, (1893) 2 Ch. 511; 62 L. J. 1015, Ch.; 69 L. T. Rep. N. S. 299; 42 W. R. 48.

(b) *Harvey v. Oliver*, 57 L. T. Rep. N. S. 239.

(c) *Lewin on Trusts*, 764, 774, 10th edit.

tinuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates (sub-sect. 2).

The section, however, does not extend to (1) any legal estate or interest in copyhold or customary land, or (2) to land conveyed by way of mortgage for securing the trust money, or (3) to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament (sub-sect. 3).

For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance deemed to be made under a power conferred by the Act (sub-sect. 4).

The section applies only to deeds executed after 31st December, 1881.

This section replaces sect. 34 of the Conveyancing Act of 1881, hence the above date.

The declaration must be by deed, and not by writing merely, though the mere appointment of a trustee under sect. 10 of the Act may be by writing only.

Sub-sect. 3 of sect. 12 saves the rights of the lords of copyhold property, which must still be passed by surrender and admittance, and the fine paid.(a) It also prevents the trusts of the money appearing on the title of land mortgaged to the trustees; and it reserves to companies and other bodies the right to require transfers of their stock to be made in the statutory form.(b)

Irrespective of the Trustee Act, 1893, a trustee on retiring should, if a new trustee is to be substituted in his place, be careful not to part with the control of the fund before the new trustee has been actually appointed, for if he transfers it into the name of the intended new trustee and by some accident the appointment fails to be completed, he will still remain a trustee and be answerable for the trust fund.(c) And a trustee should not retire in favour of a new trustee, when he knows such trustee will commit a breach of trust at the instigation of the beneficiary, or he will be made liable for that breach.(d)

A proposed new trustee should (1) inquire of what the trust property consists, and what are the trusts thereof; he should also (2) look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust. But new trustees are not fixed with notice through retiring trustees of incumbrances affecting the trust estate, of which no notice appears amongst the trust

(a) See *Scriv. Cop.* 79, 133, 185, 7th edit.

(b) See *Wolst. & B. Conv.* 210, 7th edit.

(c) *Lewin on Trusts*, 737, 9th edit.; 775, 10th edit.

(d) See *Palairot v. Carew*, 32 Beav. 564, 568; 8 L. T. Rep. N. S. 139; 32 L. J. 508, Ch.; *Head v. Gould*, 67 L. J. 480, Ch.; 78 L. T. Rep. N. S. 739; (1898) 2 Ch. 250, 270.

documents, and the existence of which, though known to the retiring trustees, is not disclosed in them.(a)

Other statutory provision is made for transferring property real or personal, which may be resorted to if thought fit, on the appointment of new trustees.

The 22 & 23 Vict. c. 35, s. 21, provides that any person may assign personal property, including chattels real, directly to himself and another person or persons, by the like means as he might assign the same to another. And by the 44 & 45 Vict. c. 41, s. 50, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

Formerly the appointment of a new trustee was usually effected by a deed indorsed on the settlement;(b) but since the 44 & 45 Vict. c. 41, s. 53, deeds expressed to be supplemental, &c., are to be read as if indorsed on the previous deed or contained a full recital thereof.

3. A trustee may be appointed by the High Court.

The Trustee Act of 1893, sect. 25, enacts that whenever it is expedient to appoint a new trustee or new trustees, and it is found *inexpedient, difficult, or impracticable* so to do without the assistance of the court, the court may make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the foregoing provision, the court may make such an order when a trustee is convicted of felony, or is a bankrupt. But an order under the section, and any consequential vesting order or conveyance, does not operate further or otherwise as a discharge to a former or continuing trustee than an appointment of new trustees under a power in any instrument would have operated. Nor can an executor or administrator be appointed under the section (sub-sects. 1-3), as such an appointment is under the jurisdiction of the Probate Division of the High Court.

When the court appoints a new trustee it may make an order vesting the land in such person and for such estate as it directs, &c.; or, if more convenient, a person may be appointed to convey the land, &c. (sects. 26, 33).

Sects. 25, 26, and 33 replace similar provisions in the Trustee Acts, 1850 and 1852.

In addition to sect. 25 of the Trustee Act, 1893, the Settled Land Act, 1882, sect. 38, provides that if at any time there are no trustees of a settlement within the definition of the Act (*ante*, p. 412), or where in any other case it is expedient for purposes of the Act that new trustees of a settlement be appointed, the court (Chancery Division) may, on the appli-

(a) *Hallows v. Lloyd*, 39 Ch. Div. 686, 691; 59 L. T. Rep. N. S. 603; 37 W. R. 12.

(b) *David*. Conv. vol. 3, pt. 1.

cation of the tenant for life or any other person having under the settlement an estate or interest in the settled land in possession, remainder or otherwise, or in the case of an infant of his guardian or next friend, appoint fit persons to be trustees under the settlement for purposes of the Act (sub-sect. 1).

The persons so appointed, and the survivors and survivor of them, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, are for purposes of this Act the trustees or trustee of the settlement (sub-sect. 2).

It will be seen (*ante*, p. 411), that by the Settled Land Act, 1890, every instrument whereby the tenant for life, in consideration of marriage, or as part of a family arrangement, makes an assignment of or creates a charge upon his estate, is to be *deemed* one of the instruments creating the settlement (sect. 4). It has, therefore, been held that when trustees of the settlement for the purposes of the Settled Land Acts are appointed by the court, the appointment should also extend to such an instrument as well as the original settlement, in order that notice of an intended sale may be given them and that they may be enabled to give a valid receipt for the purchase money.(a)

However, it seems that it is not every assignment by way of family arrangement by a tenant for life under a settlement that becomes one of the instruments creating the settlement for all the purposes of the Acts, so as to make it necessary, in order to carry out a sale by him, to appoint trustees of the compound settlement made up of the original settlement and the assignment.(b)

By the Trustee Act, 1893, every trustee appointed by the court as well before as after the trust property becomes by law or by assurance vested in him, is to have the same powers and discretions, and may, in all respects, act as if he had been originally appointed a trustee by the trust instrument (sect. 37). This section replaces sect. 33 of the Conveyancing Act, 1881. By sect. 38 of the Trustee Act of 1893, the court may order the costs of and incident to the application for the appointment of a new trustee, or for a vesting order, &c., to be paid out of the trust property, &c.

The representatives of a deceased trustee are not bound to appoint a new trustee under sect. 10 of the Trustee Act of 1893; and their refusal to do so is not, it seems, sufficient ground for ordering them to pay the costs of a petition for the appointment of a new trustee.(c)

On an application under sect. 38 of the Settled Land Act, 1882 (*supra*), the court will not usually appoint a person who is or may become tenant for life a trustee for the purposes of the Act;(d) nor the solicitor of the

(a) *Re Tibbits*, (1897) 2 Ch. 149; 66 L. J. 660, Ch.; 77 L. T. Rep. N. S. 88; 46 W. R. 3.

(b) *Du Cane and Netherfold's Contract*, 67 L. J. 393, Ch.; (1898) 2 Ch. 96.

(c) *Re Knight's Will*, 26 Ch. Div. 82; 49 L. T. Rep. N. S. 774; 50 *Id.*, 550; 32 W. R. 338, 417.

(d) *Re Harrop's Trusts*, 24 Ch. Div. 717; 53 L. J. 137, Ch.; 48 L. T. Rep. N. S. 937.

tenant for life.(a) But if the tenant for life has appointed his solicitor as trustee, the court will not remove him without just cause.(b)

And by 59 & 60 Vict. c. 35 (Judicial Trustee Act, 1896), the court may, on the application of the settlor, or of a trustee, or a beneficiary, appoint a judicial trustee of the trust, either jointly with any other person or as sole trustee, and if sufficient cause is shown, in *place* of all or any existing trustees. Such judicial trustee is subject to the control of the court as an officer thereof. Such remuneration may be paid to him as the court assigns in each case (sect. 1). The Act does not extend to any charity (sect. 6).

Stamps.—Every instrument and every decree or order of any court or commissioners whereby any property on any occasion except a sale or mortgage is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property; but a conveyance or transfer made for effectuating the appointment of a new trustee is only to be charged with a duty of 10s.(c) But if in addition to the appointment of new trustees the deed also vests the trust property in the new trustees, a further duty of 10s. must be paid thereon.(d)

Certain other Statutory Powers.—Provision is also now made for the release and disclaimer of powers by trustees.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 52, enacts that a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise the power, whether it be created by an instrument coming into operation before or after the commencement of the Act (1st Jan. 1882).

Before this section a power simply collateral, that is, a power given to a person not having any estate in the property over which the power may be exercised, could not have been released.(e)

This section does not include a disclaimer of such a power. However, by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6, it is enacted that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer cannot exercise or join in exercising the power. But the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power. This applies whether the power be created by an instrument operating before or after the commencement of this Act (1st Jan. 1883).

It must be remembered, however, that by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), a tenant for life of settled land cannot assign or

(a) *Re Kemp's S.E.*, 24 Ch. Div. 485; 31 W. R. 930.

(b) *Re Lord Stamford*, 78 L. T. Rep. N. S. 559; 65 L. J. 134, Ch.; (1896) 1 Ch. 289.

(c) 54 & 55 Vict. c. 39, s. 62, and sched.

(d) *Hadgett v. Commissioners of Inland Revenue*, 3 Ex. Div. 46; 37 L. T. Rep. N. S. 612.

(e) *Sug. Pow.* 47, 49, 8th edit.; *Hood and Chal. Conv.* 134, 5th edit.

release, or divest himself of the powers conferred upon him by that Act. (See sects. 50 to 52, *et ante*, pp. 291, 442.)

Although by the Act of 1881, a power simply collateral may be released, yet a power given to a trustee coupled with a duty cannot be released.(a)

A trustee or executor is not bound to insure or continue the insurance of the trust property against loss by fire ;(b) however, he *may*, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18, so insure buildings or other insurable property, to an amount not exceeding three equal fourth parts of the full value of such property, and pay the premiums out of the income thereof, &c., without the consent of the person entitled to the income (sub-sect. 1); provided he is not bound forthwith to convey the property absolutely to the beneficiary (sub-sect. 2), and provided he is not forbidden to do so by the trust instrument, but it applies to trusts created either before or after the Act (sub-sect. 3). And by sect. 19 of the above Act a trustee of renewable leaseholds for lives or years may, if he thinks fit, and must, if required by any beneficiary, use his best endeavours to obtain a renewal thereof, and for such purpose may surrender the subsisting lease, &c. But if the tenant for life, &c., is entitled to enjoy the same without any obligation to renew or contribute to the expense of renewal, his written consent must be obtained (sub-sect. 1). The trustee may pay the money required for the renewal out of trust money in his hands, and if he has not sufficient may raise the money by mortgage of the property comprised in the renewed lease, or of other hereditaments subject to the same uses or trusts (sub-sect. 2). This section applies to trusts created before or after the Act, but is not to authorise the trustee to do anything he is expressly forbidden to do by the trust instrument (sub-sect. 3).(c)

Indemnity Clause.—Prior to 1859 it was the practice to insert in settlements a proviso for indemnity of a trustee against the acts of his co-trustees and reimbursement of the trustee. By the Trustee Act, 1893 (replacing sect. 31 of 22 & 23 Vict. c. 35), it is provided that a trustee shall, without prejudice to the provisions in the trust instrument, be chargeable only for moneys and securities actually received by him, notwithstanding his signing any receipt for conformity, and be answerable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities are deposited, nor for the insufficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself or pay or discharge out of the trust

(a) *Re Eyre*, 49 L. T. Rep. N. S. 259; following *Weller v. Ker*, L. R. 1 H. L. Cas. 80. 11.

(b) *Bailey v. Gould*, 4 Y. & Coll. 221; 9 L. J. 43, Ex.; *Fry v. Fry*, 27 Beav. 146; 28 L. J. 593, Ch.

(c) As to the proportion in which the fines and expenses of renewal are borne between the tenant for life and the remainderman, see *Re Baring*, (1893) 1 Ch. 61; 62 L. J. 50, Ch.

premises all expenses incurred in or about the execution of the trusts or powers (sect. 24).

The express introduction into settlements of a proviso for indemnity and reimbursement of trustees may now therefore be safely dispensed with. And indeed equity itself always infused such a proviso into trust instruments.^(a)

Further provision hereon has been made by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which enacts that each trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and not for those of any other trustee, or of any banker, or other person, or for the insufficiency of any securities, or for any loss not happening through his own wilful default (sect. 41).

By sect. 42 the trustees of a settlement are not liable for giving any consent, or for not making, bringing, or doing any such application, action, proceeding, or thing, as they might make, bring, or do; and in case of purchase of land with capital money arising under the Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, &c., or answerable as regards the price, consideration, or fine, and are not liable to see to, &c., the investigation of the title, or answerable for a conveyance of land if purporting to convey it in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, &c.

By sect. 43 the trustees may reimburse themselves, or discharge out of the trust property all expenses properly incurred by them. The liability of trustees in certain cases has already (*ante*, pp. 28, 29, 51, 190, 191, 192) been discussed.

Covenants for Title.—The former practice was to make the settlor give the ordinary vendor's covenants for title.^(b) But this practice is not now generally adopted,^(c) for if a charge be suppressed, or even overlooked, the trustees on discovering it are bound to sue the settlor; and if the amount recovered against him be large this might leave him very poor, which would not be for the benefit of the wife and family, nor what was contemplated on the execution of the settlement. There should, therefore, either be no covenant for title, or at most the limited covenant given by sect. 7, sub-sect. 1 (E.) of the Conveyancing Act of 1881,^(d) which provides that in a conveyance by way of settlement a covenant by a person who conveys and is expressed to convey as settlor is implied, to the effect that the person so conveying, and every person deriving title

(a) Lewin on Trusts, 295, 10th edit.; 6 Byth. & Jar. Conv. 344, 4th edit.

(b) See 3 David. Conv. 275, pt. 1, 3rd edit.; *Id.*, pt. 2, p. 1026.

(c) See, however, David. Conc. Pr. 521, 17th edit., where the settlor is made to convey as "beneficial owner."

(d) See Wolst. & B. 37, 7th edit.; 6 Byth & Jar. Conv. 218, 4th edit.; 2 Key & Elph. Conv. 461, n. 4th edit.; 2 Prid. Conv. 369, 17th edit.

under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will at all times after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as may be reasonably required.

This limited covenant binds the settlor to bar an estate tail, or execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances created before the settlement.(a)

Form of Settlement of Real Estate.

The following is the form of a marriage settlement of real estate given in sched. 4 to the Conveyancing Act, 1881. It will be noticed there is only one set of trustees, and only two trustees are appointed; and that the settlor only covenants as such:—

THIS INDENTURE made the day of 1882 between *John M* of [&c.] of the first part, *Jane S.* of [&c.] of the second part, and *X.* of [&c.] and *Y.* of [&c.] of the third part. WITNESSETH that in consideration of the intended marriage, between *John M.* and *Jane S.*, *John M.* as settlor, hereby conveys to *X.* and *Y.* all that [&c.] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rent-charge of l. to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rent-charge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.*, successively according to seniority in tail male with remainder [insert here, if thought desirable, to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.*, in fee simple. [Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition,(b) and other powers and provisions, if and as desired.]

IN WITNESS, &c.

Registered Land.—As to the registration of settled land under the Land Transfer Acts and rules, and the registration of restrictions and inhibitions for the purposes of settlement, see *post*, tit. “Land Transfer Act and Rules.”

(a) Wolst. & B., *sup.*; 6 Byth. & Jar. Conv. 222, 4th edit.

(b) Powers of sale, exchange, and partition, are now supplied by the Settled Land Acts, as already fully detailed.

Copyholds.—If the settlement of the freeholds also comprise copyholds intended to devolve with the estate, the settlor covenants to surrender the copyholds to the use of the trustees upon trusts to correspond with the uses limited of the freeholds, so far as the difference of tenure and rules of law permit. And the settlor should further covenant to stand possessed of the copyholds until the surrender is made, upon trusts, &c., as if they had been surrendered.(a)

Leaseholds and Personal Chattels.—If leaseholds for years and personal chattels, as ancient pictures or plate, are intended to devolve with the real estate, restrictive words must be added; for words which create an estate tail in real estate usually give an absolute interest in personal property,(b) therefore chattels would, if they were merely settled upon trusts to correspond with the uses of the freeholds, vest absolutely in the first tenant in tail in possession, although an infant, and who dies without attaining majority. And in such an event the chattels pass to his next of kin, and the ownership is severed from that of the realty.(c)

To obviate this effect it is usual to expressly declare in the settlement that the leaseholds for years or other chattels shall not vest absolutely in any tenant in tail by purchase unless he attains twenty-one.(d) The word "purchase" is used to prevent the direction from being void for remoteness.(e)

Realty Settled on Trust for Sale.

Another mode of settling a small freehold estate where there is no desire to keep it in its actual condition, but at the same time there is occasion for an immediate sale, is to convey it to trustees upon trust for sale, subject to specified trusts of the proceeds, &c.

Such a settlement is usually effected by two deeds. By one of the deeds, made between the intended husband of the first part, the intended wife of the second part, and the trustees of the third part, the property is conveyed by the settlor as such to the trustees, their heirs and assigns, to hold the same to the use (1) of the husband, his heirs and assigns, until the marriage, and after this event (2) upon trust at the written request of the husband and wife during their joint lives, and afterwards at that of the survivor, and after the death of the survivor at the discretion of the trustees, to sell the settled property and to stand possessed of the proceeds of the sale upon trusts, &c., to be declared by another deed of even date, and made between the same parties, as the deed of conveyance. The trusts of the rents and profits of the land until a sale may be declared by

(a) See 3 David. Conv. 597, pt. 1, 3rd edit.; 6 Byth. & Jar. Conv. 234, 4th edit.; and for a form see *Id.*, p. 697.

(b) *Leventhorpe v. Ashbie*, L. C. Conv. 861, 3rd edit.

(c) *Scarsdale (Lord) v. Curzon*, 1 John. & H. 40; 29 L. J. 249, Ch.; *Harrington v. Harrington*, L. R. 5 H. L. Cas. 87, 101.

(d) *Id.*, and see 3 David. Conv. 601, pt. 1, 3rd edit.; 6 Byth. & Jar. Conv. 511, 4th edit.; and for a form, *Id.*, p. 710; 2 Key & E. Conv. 617, 5th edit.

(e) David. *sup.*, p. 602 n. (s); *et ante*, p. 423.

the deed of conveyance or by the deed declaring the trusts of the proceeds.(a)

The advantage of this mode is that the trust for sale will not be carried into effect unless it is found expedient to do so, and the effect until this is done is the same as if the land had been settled directly to uses for the benefit of the parents and their children, with a power of sale, except that the property is by force of the trust for sale considered as personalty under the doctrine of conversion.(b) As to the effect of the Settled Land Act, 1882, sect. 63, as amended by the Settled Land Act, 1884, sects. 6 (1), 7, see *ante*, p. 444.

Disentailment and Resettlement.

A resettlement of real estate which has been strictly settled usually occurs on the coming of age or on that event and marriage of the eldest son during his father's lifetime, the son being under the original settlement tenant in tail in remainder, the father being tenant for life in possession. Without such a resettlement the son would not, as a rule, be able to make proper provision for his own wife and family.

To effect a resettlement, the tenant for life (who is protector of the settlement) and the tenant in tail must first join in barring the entail created by the original settlement. This is best done by a separate deed made between (1) the tenant for life (father) of the first part, the tenant in tail (son) of the second part, and the grantee to uses of the third part. Then (2) come the recitals (i.) of the settlement, (ii.) of the birth and majority of the eldest son, and (iii.) of the desire to disentail the settled property; (3) the testatum, whereby the property is granted by father and son to the grantee to uses in fee; (4) (*habendum*) to be held by him in fee subject to the uses and estates preceding the estate tail (other than the father's life estate) and to all powers annexed to such preceding uses and estates, &c., but freed from the estate tail, and all estates, &c., to take effect after it; nevertheless subject to such uses and trusts, &c., as the father and son shall jointly appoint, &c., and in default of appointment, &c., to the subsisting uses, &c., of the original settlement. Under the above power the resettlement can be effected.(c) The disentailing assurance requires enrolment in the central office of the High Court within six months after its execution, under the provisions of the 3 & 4 Will. 4, c. 74, s. 41.

By the new settlement the property is settled afresh, and if this is done on the son's marriage and one deed only is used for the purpose, it consists of (1) the date, and parties who are the father of the first part, the son of the second part, and his intended wife of the third part, and the trustees of the third part, or third and fourth parts if more than one set of trustees are appointed. (2) The recitals follow. (3) In the operative clause the father and son (pursuant to the power given by the disentailing assurance)

(a) See 6 Byth. & Jar. Conv. 224, 234, 4th edit.; and for forms, see *Id.*, pp. 661, 662, n., 664; David Cono. Pr. 482, 17th edit.

(b) 6 Byth & Jar. Conv. 661, n., 4th edit.

(c) See 6 Byth. & Jar. Conv. 376, 521, and for a form, *Id.*, 785, 4th edit.; 2 Key & E. Conv. 540, 5th edit.; 3 David. Conv. 1288, pt. 2, 3rd edit.

as settlors appoint the property, subject as above, to the subsisting uses (*supra*) until the marriage, and after the marriage (i.) to the use that the son receive, during the joint lives of himself and his father, a yearly rent-charge out of the property; then (ii.) to the use that the son's wife may after his death receive thereout a yearly rent-charge by way of jointure; subject thereto (iii.) to the use of the father for his life (without impeachment of waste), in restoration and continuation of his former life estate; and after his death (iv.) to the use of the son for his life (without impeachment of waste); (v.) remainder to the use of the trustees for a term of five hundred years to raise portions for the son's younger children; (vi.) remainder to the use of the son's first and other sons in tail male, then to them in tail; (vii.) then to his first and other daughters in tail male, then to them in tail; (viii.) followed by similar limitations to the father's other sons and their issue, with (ix.) an ultimate remainder to the use of the son in fee. (4) The trusts of the portions term are next declared. (5) Powers of maintenance^(a) and advancement of the son's younger children may follow; and (6) a power for the son to jointure a future wife and to charge portions for the children of that marriage. And (7) a power for successive tenants for life to charge jointures and portions, &c. Other powers may also be requisite.^(b)

When the resettlement is made on the son's marriage it is, however, thought more convenient to frame the resettlement without any express reference to the intended marriage, and to have a separate deed of settlement in exercise of powers of jointuring and charging portions inserted in the resettlement.^(c)

It is a question whether the powers expressly given to the father by his own settlement, or exerciseable by him as tenant for life under that settlement, cease to be exerciseable by him after the settlement comes to an end, as when he concurs in a resettlement of the estate.^(d) To provide against this it is the practice to limit to him in the resettlement an estate for life in restoration and continuation of his former life estate, as in the above sketch;^(e) which puts him in the same position as if he had not dealt with his life estate by the resettlement.^(f) It is also advisable to declare in the resettlement that any powers it is specially wished shall remain exerciseable by the father as tenant for life under his own settlement are to remain exerciseable; as the powers of jointuring a future wife and charging portions for the children of such wife.^(g)

(a) But see hereon *ante*, p. 420.

(b) See 6 Byth. & Jar. Conv. 376, 4th edit.; and for forms see *Id.*, p. 712.

(c) See 2 Prid. Conv. 382 n., 17th edit., where a form is given; also in 2 Key & E. Conv. 665, 6th edit.

(d) *Re Ailesbury and Iveagh*, (1893) 2 Ch. 345, 357; 62 L. J. 713, Ch.; 41 W. R. 644; *Re Barry Railway and Wimborne*, 76 L. T. Rep. N. S. 489.

(e) Elph. Intr. Conv. 498, 4th edit.

(f) *Re Wright and Marshall*, 28 Ch. Div. 93, 96; 54 L. J. 60, Ch.; 51 L. T. Rep. N. S. 781; 33 W. R. 304.

(g) Elph. Intr. Conv. *sup.*; 6 Byth. & Jar. Conv. 378, 4th edit.; 2 Prid. Conv. 386, 17th edit.

As to settled copyholds : If the custom of the manor permits of an estate tail, and it is wished to bar it for the purpose of a resettlement, then, as already (*ante*, p. 378) stated, a legal entail in copyholds must be barred by surrender ; but if the entail be equitable, it may be barred either by surrender or deed. The surrender or deed requires no enrolment except an entry on the court rolls of the manor. If the tenant for life consents by deed, it must be executed either at the time of or before the surrender is made, and be entered on the court rolls. If the consent is not given by deed, it must be given to the person taking the surrender barring the entail.(a)

When the entail is barred by deed, the deed must be entered on the court rolls of the manor within six months after its execution.(b)

Infants' Settlements.

The provisions of the Settled Land Act, 1882, as to the exercise of the powers of that Act in case of infancy have already (*ante*, p. 441) been considered.

And by the 18 & 19 Vict. c. 43 (1855), an infant, upon or in contemplation of marriage, may, with the sanction of the Chancery Division of the High Court obtained on summons, make a binding settlement, or contract for a settlement of all or any part of his or her property, or of property over which he or she has any power of appointment, real or personal, in possession or expectancy. But this Act is not to extend to powers of which it is expressly declared that they shall not be exercised by an infant (sects. 1, 3). The Act does not apply to male infants under twenty years of age or to female infants under seventeen years of age (sect. 4). And it is provided that if any power of appointment, or any disentailing assurance, be executed by an infant tenant in tail under the provisions of the Act, and such infant afterwards dies under age, such appointment or disentailing assurance shall become absolutely void (sect. 2).

It seems that the words of sect. 1 are wide enough to include a post-nuptial settlement, whether the infant be a male or a female, if made on the occasion of marriage.(c)

It has also been held that if an infant makes an appointment under sect. 1, and then dies, sect. 2 does not render the appointment void except in the case of an infant tenant in tail.(d)

The court has no jurisdiction under the Act to compel an infant ward of court to make a settlement of his *own* property, though married without the consent of the court. It would be otherwise if he married

(a) 3 & 4 Will. 4, c. 74, ss. 50 to 54.

(b) *Honeywood v. Forster*, 30 Beav. 1 ; 4 L. T. Rep. N. S. 785 ; 9 W. R. 853.

(c) Per Lord Selborne, in *Re Sampson and Wall*, 25 Ch. Div. 482 ; 50 L. T. Rep. N. S. 435 ; 53 L. J. 457, Ch. ; 32 W. R. 617 ; and see *Seaton v. Seaton*, 13 App. Cas. 61 ; 57 L. J. 661, Ch. ; 58 L. T. Rep. N. S. 565 ; 36 W. R. 865.

(d) *Scott v. Hanbury*, (1891) 1 Ch. 298 ; 63 L. T. Rep. N. S. 800 ; 60 L. J. 461, Ch.

a female ward of court without leave of the court, for then he would be in contempt and would be compelled to make a settlement of his *wife's* property.(a) And the Act removes the disability of infancy only, leaving unaffected the disability of coverture.(b)

A settlement by a male infant of his property upon his marriage without the sanction of the court is as regards him voidable and not void;(c) and not falling within the provisions of the Infants Relief Act, 1874,(d) is capable of confirmation after the infant attains majority.(e) And prior to the Married Women's Property Act, 1882, where in an ante-nuptial settlement there was an agreement by husband and wife for the settlement by them of the wife's after-acquired property, the wife being at the time a minor, it was held that the covenant was voidable only and not void; and that on attaining twenty-one and during coverture she might elect whether the covenant should be binding or not.(f)

Where an infant may either repudiate or confirm a settlement, the repudiation must be effected within a reasonable time after the infant comes of age, or he is bound by it.(g)

However, what is a reasonable time depends upon the circumstances of each particular case.(h) And the wife cannot take a benefit under a settlement out of property bound by the settlement, and at the same time repudiate it in respect of property belonging to her which is not bound by the settlement; but she will be compelled in equity to elect whether she will take under or against the settlement;(i) unless the property bound by the settlement is settled to her separate use with a restraint against anticipation.(k)

In a case occurring since the Married Women's Property Act, 1882, an infant was entitled to 1000*l.*, and by a settlement made on her marriage with an adult, joined with him in assigning the same to trustees to be held on the usual trusts for herself, her husband and children; but on attaining twenty-one she disaffirmed the settlement. It was, however,

(a) *Leigh v. Leigh*, 40 Ch. Div. 290; 58 L. J. 306, Ch.; 60 L. T. Rep. N. S. 404; *Seaton v. Seaton*, sup.

(b) *Seaton v. Seaton*, sup.

(c) *Edwards v. Carter*, (1893) A. C. 360; 69 L. T. Rep. N. S. 153; 63 L. J. 100, Ch.

(d) See ante, p. 11.

(e) *Duncan v. Dixon*, 44 Ch. Div. 211; 62 L. T. Rep. N. S. 319; 59 L. J. 437, Ch.; 38 W. R. 700.

(f) *Smith v. Lucas*, (1881) 18 Ch. Div. 531; and see *Duncan v. Dixon*, sup.; *Wilder v. Pigott*, 22 Ch. Div. 263.

(g) *Edwards v. Carter*, (1893) A. C. 360; 69 L. T. Rep. N. S. 153; 63 L. J. 100, Ch.

(h) *Re Jones*; *Farrington v. Forrester*, (1893) 2 Ch. 461; 62 L. J. 996, Ch.; 69 L. T. Rep. N. S. 45.

(i) *Codrington v. Lindsay or Codrington*, L. R. 8 Ch. App. 578; 7 H. L. Cas. 854; 42 L. J. 526, Ch.; *Smith v. Lucas*, 18 Ch. Div. 531; *Hamilton v. Hamilton*, (1892) 1 Ch. 396; 61 L. J. 220, Ch.; 40 W. R. 312.

(k) *Smith v. Lucas*, sup.; *Re Vardon's Trusts*, 31 Ch. Div. 275; 55 L. J. 259, Ch.; 53 L. T. Rep. N. S. 895, C. A.; *Hamilton v. Hamilton*, sup.

held that though under sect. 2 of the Married Women's Property Act, 1882, the 1000*l.* would have been her separate property, yet the settlement, under the provisions of sect. 19 of the Act,^(a) displaced the provisions of sect. 2, and that the trustees were entitled to hold the 1000*l.* on the trusts of the settlement, being regarded as a settlement made by the husband.^(b)

Ratification consists in recognising the settlement as binding; therefore, if the wife should after attaining twenty-one do this by deed, such deed is binding upon her, although unacknowledged and although the marriage was before the operation of the Married Women's Property Act, 1882.^(c) Indeed, an infant's contract of this nature need not be affirmed after the infant comes of age; as already stated, unless repudiated within a reasonable time after this event it is binding.^(d)

Settlements of Personal Property.

Personal property may, as already stated, be the subject of a settlement on marriage; and the remarks made *ante*, p. 400, *et seq.*, as to the effect of the fourth section of the Statute of Frauds upon agreements made upon consideration of marriage, and as to marriage articles and the object of a settlement, apply generally to the case of a settlement of personal estate.

The following is usually the arrangement of the clauses of a settlement of personalty:—

(1) The date, and parties, intended husband of the first part, the intended wife of the second part, and the trustees of the third part. (2) The recitals, which vary with the nature of the property settled, as will be shown in subsequent pages. (3) The assignment to the trustees of his property by the intended husband, as settlor, where this can properly be effected by the settlement, as of a policy of life assurance; or of a reversionary interest in personalty; or of personal chattels, as shown in subsequent pages. (4) A similar assignment by the intended wife of her property. (5) Declaration of the trusts of the property settled. (6) Other clauses are also sometimes introduced, as (i.) a covenant by the parent of the husband or wife to pay an annuity to the trustees for the married couple; (ii.) a covenant by husband and wife to settle her after-acquired property; (iii.) any powers that may be thought necessary, as to apportion blended trust funds; or to invest in the purchase of lands.^(e) The clause enabling the trustees to give receipts, the power to

(a) See *ante*, p. 409.

(b) *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307; 62 L. J. 660, Ch.; 69 L. T. Rep. N. S. 11; 41 W. R. 412.

(c) *Re Hodson's Settlement*, (1894) 2 Ch. 421; 63 L. J. 609, Ch.; 71 L. T. Rep. N. S. 77; 43 W. R. 531.

(d) *Edwards v. Carter*, *sup.*, p. 470; *Viditz v. O'Hagan*, (1899) 2 Ch. 569; 68 L. J. 558, Ch.; 80 L. T. Rep. N. S. 794.

(e) See forms, 2 Prid. Conv. 304, *et seq.*, 17th edit.; David. Conc. Pr. 462, 470, 17th edit.

appoint new trustees, and the trustee indemnity clause are now usually omitted, as already (a) shown.

We propose first to show how the different sorts of personal property are vested in the trustees of the settlement, when not effected by the settlement itself, and incidentally to treat of recitals.

Leaseholds.—We have already (b) stated the practice when leaseholds for years are settled so as to devolve with the freeholds in strict settlement. If brought into settlement alone they are as a rule assigned to trustees upon trust for sale, the trusts of the proceeds being declared by a separate deed, and the remarks before made (*ante*, p. 466), with reference to freeholds apply, allowing for the difference in tenure, to leaseholds. However, the deed of assignment should contain a clause indemnifying the trustees against liability in respect of the rent and covenants. (c) As to the liability of a tenant for life in respect of the rent and covenants of a lease bequeathed by will to one for life with remainder over, see *post*, tit. "Wills."

Mortgage Debt.—Where a mortgage debt is to be brought into settlement, the debt and the security for the same are usually transferred to the trustees by a separate deed, which will prevent the mortgagor from being implicated in the trusts of the settlement; and, on the other hand, will prevent him from acquiring knowledge of the contents and operation of the settlement. (d) The settlement will recite the transfer and declare the trusts of the mortgage money.

Stocks, Funds, &c.—Stock in the funds of the Government of the United Kingdom, and certain other stocks, pass by transfer in the books of the Bank of England. Stocks and shares in railway companies and in joint stock companies are transferred in accordance with the regulations of the particular company, by deed, or writing not under seal, and the transfer is registered in the books of the company. In all these cases the stock or shares is or are usually transferred to the trustees of the intended settlement before its execution, and the fact of the transfer is recited in the settlement.

Securities which pass by mere delivery of the security (as is generally the case with the bonds and debentures of railways of the United States of America and certain Colonial bonds) should be delivered to the trustees before the settlement thereof is executed, and such delivery be recited in the settlement.

Such a security is now liable on transfer to stamp duty, as provided by 62 & 63 Vict. c. 9, s. 4.

Life Assurance Policy.—A common subject of settlement where the husband has no other fund is a policy of life assurance. It will be remembered that by 14 Geo. 3, c. 48, the assured must have an insurable

(a) See *ante*, pp. 427, 455, 463.

(b) *Ante*, p. 466.

(c) See further 6 Byth. & Jar. Conv. 236, 4th edit.

(d) 6 Byth. & Jar. Conv. 237, 4th edit.; see also *Dobson v. Land*, 4 De G. & Sm. 575.

interest; and every person has an insurable interest in his own life.(a) And the above Act does not prohibit a policy of life assurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument.(b) And by the Married Women's Property Act, 1882, s. 11, a married woman may, as already shown (*ante*, p. 408), effect a policy on her own or her husband's life for her separate use.

The policy is, therefore, either taken out by the intended husband on his own life and in his own name before the marriage, or else the policy is effected by the husband on his life in the names of the trustees of the settlement.(c) If the policy is taken out in the name of the husband, it is necessary that it should be assigned to the trustees of the settlement, and written notice thereof should be given by the trustees to the insurance office under 30 & 31 Vict. c. 144, and the assignment be duly stamped under 54 & 55 Vict. c. 39, s. 118, so as to enable the trustees to sue in their name for the amount of the policy moneys, if necessary. If the policy is taken out in the name of the trustees the necessity of an assignment, and of giving notice to the insurance office, are obviated, and the risk of forfeiture of the policy is diminished.(d)

The settlement, after the date and parties, recites the intended marriage and the fact of the policy having been effected in the name of the husband which is followed by the assignment of the policy and policy moneys by the settlor, as settlor, to the trustees.

An assignment of the sum assured as well as of the policy will carry any bonus declared;(e) but it is better to declare by the settlement what should be done with any bonus. Sometimes the trustees are empowered to apply it in reduction of the premiums.

After the assignment the trusts of the policy moneys are declared; but where, as is often the case, a life policy is settled together with other personal property, the trusts of the policy moneys may be declared by reference to the trusts of the other property.(f) But if no other property is settled, the trusts would usually be to invest the amount and apply the income thereof for the wife for life for her separate use, without power of anticipation, and after her death, for the issue of the marriage,(g) &c., as will be shown more in detail subsequently.

The assured should, by the settlement, enter into an express covenant that he will not do or suffer anything to vitiate the policy, and will effect a new policy in its stead if it should become void, for the amount which

(a) See *ante*, p. 187.

(b) *Collett v. Morrison*, 9 Hare, 162; Lewin, *Trusts*, 113, 10th edit.

(c) See a form, 3 David. Conv. 795, pt. 2, 3rd edit.; 2 Key & E. Conv. 526, 529, 6th edit.

(d) See 6 Byth. & Jar. Conv. 245, 4th edit.; 3 David. Conv. 795, n. pt. 2, 3rd edit.

(e) *Courtney v. Ferrers*, 1 Sim. 137; 6 Byth. & Jar. Conv. 245, 4th edit.

(f) See a form David. Conc. Pr. 464, 17th edit.; Byth. & Jar. Conv. 594, 4th edit.; 2 Key & E. Conv. 530, 534, 6th edit.

(g) See a form David. Conc. Pr. 466, 17th edit.; 6 Byth & Jar. Conv. 557, 4th edit.; 2 Key & E. Conv. 526, 6th edit.

would have been payable under the void policy if he had then died; also that he will regularly pay the premiums and deliver the receipts for the same to the trustees. The covenant should be "not to do or suffer anything," &c., as a mere affirmative covenant "to do all acts, &c., requisite for keeping on foot the policy," cannot be read negatively, and is not broken by the covenantor's suicide, though it avoids the policy.(a) The settlement gives the trustees power to keep up the policy in case of default by the assured in doing so, but to protect them declares that it shall not be obligatory upon them to do so; and also exonerates them from any obligation to enforce the assured's covenant to keep up the policy.

If the trustees advance money of their own for this purpose they will obtain a lien on the policy for the amount advanced.(b)

A power is sometimes given enabling the trustees, with the consent of the wife, and after her death at their discretion, to surrender the policy to the insurance company, and to hold the proceeds thereof upon the trusts declared. Or, instead of this, a clause may be inserted permitting the husband to redeem the policy on his paying to the trustees a fixed sum of money, who, after such payment, are to stand possessed of the policy and policy moneys in trust for him, his representatives and assigns. Trusts of the money paid are then declared.(c)

The policy should be delivered to the trustees of the settlement. Subject to rules of court(d) any life assurance company may, by 59 Vict. c. 8, pay into court any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors no sufficient discharge can otherwise be obtained; and the receipt of the proper officer is a sufficient discharge to the company. Previous to this Act it had been held that an insurance company was not a trustee of the policy moneys, but a debtor, and had, therefore, no right to pay the moneys into court under the Trustee Relief Act, in case of conflicting claims.(e)

Reversions.—A reversionary interest in personalty is brought into settlement by an assignment thereof to the trustees which may be made by the settlement itself, which should also by recitals show the settlor's interest in and title to the property. The trustees of the settlement should give notice of the assignment to the trustees of the instrument under which the reversionary interest is derived, as in the case of any other *chose in action*.(f)

If no other property than a reversionary interest be brought into settlement, and there is no sufficient immediate income for the married

(a) *Dormay v. Borrodaile*, 10 Beav. 335; 5 C. B. 380.

(b) *Leslie v. French*, 23 Ch. Div. 552; 52 L. J. 762, Ch.; 48 L. T. Rep. N.S. 564; 31 W. R. 561.

(c) See a form 3 David. Conv. 808, pt. 2, 3rd edit.; David. Conc. Pr. 468, 17th edit.; 2 Prid. Conv. 301, 17th edit.

(d) These rules are dated October, 1896, and subsequently passed as Ord. LIV. C. of the Rules of the Supreme Court.

(e) *Matthew v. Northern Assurance Co.*, 9 Ch. Div. 80.

(f) See *ante*, pp. 174, 188.

couple, the usual course is for the father of the husband, when reversion is expectant on his life interest, to covenant that he will during his life and so long as the husband and wife or the survivor or any issue of the marriage are living, pay to the trustees an annuity of so much for their benefit. If the reversionary interest be expectant on the life of the wife's father or mother, that parent would enter into the covenant. The covenant is entered into with the trustees of the settlement. The trusts of the annuity are then declared, but if any property in possession is brought into settlement the trusts of the annuity may generally be declared by reference to the income of such property.(a)

The annuity is made payable half-yearly or quarterly, but it is no longer necessary to make it "accrue from day to day," as was formerly done in order to provide for payment of a proportionate part in case of the death of the father between two-quarter or half-yearly days; as the effect of the Apportionment Act of 1870 (33 & 34 Vict. c. 35) is to obviate the necessity of expressly stating that the annuity shall so accrue.(b)

Chattels Personal.—We have already stated the practice where it is desired that personal chattels shall devolve with an estate strictly settled.(c) Personal chattels pass either by actual delivery or by deed, as shown *ante*, p. 246, but where it is intended that the legal ownership thereof shall vest in trustees but that the beneficial enjoyment shall be subject to successive limitations an assignment in writing is necessary;(d) however, it must be remembered that declarations of trusts of chattels personal are not within sect. 7 of the Statute of Frauds, and a trust by averment will be supported.(e)

The assignment may be effected by the deed of settlement and the trusts of the chattels thereby declared.

In the case of furniture already bought, it is better to give a particular enumeration of the chattels, which may be conveniently done by means of a schedule to the settlement. And a clause may, if desired, be introduced authorising the persons in possession to supply the place of the original articles by new ones of equal value.(f) So a power may, if thought fit, be given to the trustees to sell the furniture, with the consent of the wife, and to invest the proceeds and stand possessed thereof on similar trusts to those of the furniture. A proviso should be added indemnifying the trustees against loss or destruction of the furniture while in possession of husband and wife.(g)

A settlement of chattels on marriage does not require registration as a bill of sale, being expressly excepted from the definition of a bill of sale by sect. 4 of the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31);

(a) See a form, 6 Byth. & Jar. 591, 595, 4th edit.; 3 David. Conv. 761, 769, pt. 2, 3rd edit.; David. Conc. Pr. 481, 17th edit.; 2 Key & E. Conv. 530, 6th edit.

(b) See *ante*, p. 328.

(c) *Ante*, p. 466.

(d) 6 Byth. & Jar. Conv. 240, 4th edit.

(e) See Lewin on Trusts, 53, 10th edit.; *et ante*, p. 400.

(f) 6 Byth. & Jar. Conv. 241, 4th edit.

(g) See a form, 2 Prid. Conv. 366, 17th edit.; 2 Key & E. Conv. 553, 555, 6th edit.

but this means an ante-nuptial settlement, for a post-nuptial settlement has been held not to be within the exception, and therefore requires registration under the Act.(a)

Covenants to Settle After-acquired Property.

A covenant for bringing into the settlement to be held on the trusts thereof, any property, real or personal, coming to the wife after the marriage is frequently inserted in settlements; although such a clause as to any woman coming within the provisions of the Married Women's Property Act, 1882,(b) is not required to protect her property from the claims of the husband; yet it is still necessary where it is wished to secure it for the issue of the marriage, or to put a restraint upon anticipation by the wife.

A covenant by the intended husband to settle his after-acquired property is unusual; and by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (2), a covenant in consideration of marriage for the future settlement on the settlor's wife or children of property wherein he had not, at the date of the marriage, any estate or interest, in possession or remainder, and not being property of, or in right of his wife, is, on his bankruptcy before the property is actually transferred, void against his trustee in bankruptcy, as will be shown more fully subsequently when treating of voluntary settlements.

As to the wife's future property: the clause in question should be framed as an agreement and declaration by all parties, including the wife; for when this is done both husband and wife are bound by the covenant.(c) And if the covenant is by the husband alone, yet if it appears that the wife is an assenting party thereto and the settlement is executed by her, she, as well as the husband, is bound thereby.(d)

Where, however, the covenant is by the husband alone, neither of the two last-mentioned propositions being present, the husband only is bound by such covenant.(e)

It is usual to except from the operation of the covenant any property coming to the wife of less value than (say) 200*l.*; also any jewels, plate, or articles of a like nature, which the covenant declares shall belong to her as her separate property.(f)

The covenant should be wide enough to include not only future

(a) *Fowler v. Foster*, 28 L. J. 210, Q. B.; 5 Jur. N. S. 99; *Ashton v. Blackshaw*, L. R. 9 Eq. 510; 39 L. J. 205, Ch.; 22 L. T. Rep. N. S. 197; *et ante*, p. 250.

(b) See *ante*, pp. 15, 403 to 408.

(c) 3 David. Conv. 196, pt. 1, 3rd edit.; *Campbell v. Bainbridge*, L. R. 6 Eq. 269, 273; 37 L. J. 634, Ch.

(d) *Lee v. Lee*, 4 Ch. Div. 175, 179; *Re De Ros' Trust*, 31 Ch. Div. 81; 55 L. J. 73, Ch.; *Re Haden*, (1898) 2 Ch. 220; 67 L. J. 428, Ch.

(e) *Dawes v. Tredwell*, 18 Ch. Div. 354; 45 L. T. Rep. N. S. 119; *Re Rickman*, 80 L. T. Rep. N. S. 518.

(f) See forms, 3 David. Conv. 728, pt. 2, 3rd edit.; 6 Byth. & Jar. Conv. 549, 4th edit.; David. Conc. Pr. 440, 17th edit.

property coming to the wife, or to her husband in her right, but also property belonging to her at the time of the marriage, but which by some oversight has not been specifically included in the settlement. Thus where the covenant was to settle property "to which the wife shall become entitled," it was held that it did not extend to property to which, without the knowledge of the intended husband or the trustees, the wife was then absolutely and immediately entitled; for "become entitled" imports a change of condition in the property.(a) Nor would such a covenant as last mentioned include property in which the wife has an estate in remainder at the date of the settlement, but which does not fall into possession until the coverture has determined.(b) But if the remainder falls into possession during the coverture it is otherwise.(c) And if she becomes entitled to a reversionary interest during the coverture it will, as against the husband surviving, be bound by the covenant, though the interest does not fall into possession until after her death;(d) and if the wife has joined in the covenant she will under similar circumstances, if the survivor, be bound by the covenant.(e)

A covenant by husband and wife to settle the wife's future property will not apply to property acquired after the determination of the coverture, although the words "during the coverture" are not inserted, if the wife survives;(f) but it seems that if the covenant is by the husband and he survives, property acquired after the wife's death must be brought into settlement.(g) Nor will such a covenant by husband and wife affect or control a general power of appointment over property given to the wife, as there is a clear distinction between property and a power over it.(h) And a decree for judicial separation of husband and wife renders the covenant inoperative.(i)

Such a covenant, however, will bind property given to the wife's separate use, unless she is restrained from alienation.(k). And where such a covenant is entered into by husband and wife without exception or qualification, and afterwards property is given to her during the

(a) *Otter v. Melville*, 2 De G. & Sm. 257; 17 L. J. 345, Ch.; *Archer v. Kelley*, 1 Dr. & Sm. 300; 29 L. J. 911, Ch.; 8 W. R. 684.

(b) *Re Pedder's Settlement*, L. R. 10 Eq. 585; 40 L. J. 77, Ch.; *Re Michell's Trusts*, 9 Ch. Div. 5; 48 L. J. 50, Ch.; 38 L. T. Rep. N. S. 462; 26 W. R. 762.

(c) *Archer v. Kelley*, sup.

(d) 3 David. Conv. 211, pt. 1, 3rd edit.; *Hughes v. Young*, 32 L. J. 137, Ch.; 9 Jur. N. S. 376.

(e) *Butcher v. Butcher*, 14 Beav. 222.

(f) *Carter v. Carter*, L. R. 8 Eq. 551; 39 L. J. 268, Ch.; *Re Edwards*, 9 Ch. App. 97; 43 L. J. 265, Ch.

(g) *Fisher v. Shirley*, 43 Ch. Div. 290; 59 L. J. 29, Ch.

(h) *Townshend v. Harrowby*, 27 L. J. 553, Ch.; 4 Jur. N. S. 353.

(i) *Dawes v. Greyke*, 30 Ch. Div. 500; 54 L. J. 1096, Ch.; 53 L. T. Rep. N. S. 292.

(k) *Coventry v. Coventry*, 32 Beav. 612; 8 L. T. Rep. N. S. 819; 11 W. R. 868; *Re Currey*, 32 Ch. Div. 361.

coverture, no expression of intention of the donor that it shall not be settled will exclude it from the operation of the covenant.(a)

Where the covenant to settle the wife's after-acquired property contains an exception of property given to her separate use, and she after the Married Women's Property Act, 1882, acquires property which, in the absence of the settlement, sect. 5 of the Act would have made her separate property, yet by sect. 19 of the Act such property is bound by the settlement as if the Act had not been passed.(b) The same result follows although the wife does not join in the covenant.(c)

If the wife is an infant at the time she enters into a covenant to settle her after-acquired property without the sanction of the court, she may, on attaining twenty-one and during the coverture, elect whether she will affirm or repudiate the settlement to the effect stated *ante*, p. 470.

Trusts of a Settlement of Personality.

Having shown how the property is vested in the trustees, and considered the covenant to settle after-acquired property, we now (in addition to what has already been stated)(d) have to consider more fully the trusts of the settlement. These usually are (1) that the trustees shall stand possessed of the settled property for the settlor until the marriage, and afterwards (2) to retain the same, or with the written consent of husband and wife, or the survivor, and after the death of the survivor at the discretion of the trustees, to sell the same and invest the proceeds thereof, with power with such consent or at such discretion as above to vary the investments. It is no longer necessary to provide that a trust or power given to two or more may be exercised by the survivor, as already(e) shown.

It has(f) been fully shown what are authorised statutory investments for trust funds, and that if other securities paying larger interest or dividends are required for investment the trustees must be expressly authorised by the settlement to invest thereon. It has also been stated what precautions a trustee should take before advancing trust moneys on real securities so as to avoid a breach of trust.(g) (3) After the trust for investment, the trusts of the income of the invested funds follow. As to whether husband or wife is to take the first life interest in the settled property is a matter for agreement, but the usual practice is for each of them to take the first life interest in the property settled on his or her behalf; but sometimes, if the husband is engaged in trade, the wife takes the first life interest in both properties, so that if the husband's affairs become involved, a fund is provided for the maintenance of the family.

(a) *Scholefield v. Spooner*, 26 Ch. Div. 94; 53 L. J. 777, Ch.

(b) *Re Stonor's Trusts*, 24 Ch. Div. 195; 52 L. J. 776, Ch.; 48 L. T. Rep. N. S. 963; 32 W. R. 413; *Re Whitaker*, 34 Ch. Div. 227; 56 L. J. 251, Ch.; 35 W. R. 217.

(c) *Hancock v. Hancock*, 38 Ch. Div. 78; 57 L. J. 396, Ch.; 58 L. T. Rep. N. S. 906; 36 W. R. 417; *et ante*, pp. 403, 409.

(d) See *ante*, p. 471, *et seq.*

(e) *Ante*, p. 448.

(f) *Ante*, p. 449, *et seq.*

(g) *Ante*, p. 190.

In framing this trust it must be remembered that (i.) where the property comes from the wife, or from any other source than that of the husband himself, the income thereof may be given to him for life, but determinable on his assigning or charging the same or becoming bankrupt, &c., followed by a gift over in favour of the wife and issue of the marriage.(a) But (ii.) where the property settled comes from the husband *himself*, though the income thereof may be reserved to him until he assigns or charges the same, or becomes bankrupt, &c., any limitation over on his bankruptcy would be void as a fraud upon the bankruptcy laws; and his interest in the property would pass to his trustee in bankruptcy for the benefit of creditors generally.(b) However, the clause against assigning, &c., with a limitation over in such event to the wife, is good against a particular assignee as a mortgagee;(c) or an assignee by process of law, as a judgment creditor.(d) (iii.) A mere condition annexed to a gift, as by will, of a life interest, that the donee (not being a married woman) shall not alien, &c., not followed by a limitation over, is inoperative on the donee's bankruptcy.(e) And a gift of a life interest subject to a clause of forfeiture in case the donee should mortgage or assign the same, was held not to be forfeited by the donee's bankruptcy, which caused an involuntary assignment, and the assignee in bankruptcy took the donee's interest;(f) but where the forfeiture is to accrue if the donee should assign, &c., or "do or suffer" any act whereby the income should become payable to another, then such forfeiture takes place on a judgment creditor obtaining a charging order on the fund;(g) or on the donee's bankruptcy,(h) and the gift over, or provision for cesser, takes effect. If there be a clause forfeiting the life interest on bankruptcy, &c., and the donee is an uncertificated bankrupt at the time of the gift, this has been held to cause a forfeiture, as the condition does not refer exclusively to a future bankruptcy.(i) If, however, the bankruptcy is annulled before the life interest falls into possession, that prevents a forfeiture.(k) But it seems that if any income has accrued on the fund

(a) *Dommett v. Bedford*, 3 Ves. 149; *Lester v. Gatland*, 5 Sim. 205; *Lockyer v. Savage*, 2 Stra. 947.

(b) *Higinbotham v. Holme*, 19 Ves. 88; *Morton v. Blackmore*, (1896) 2 Ch. 503; 75 L. T. Rep. N. S. 177; 45 W. R. 8.

(c) *Brook v. Pearson*, 27 Beav. 181, *Knight v. Browne*, 4 L. T. Rep. N. S. 207; 30 L. J. 649, Ch.; 9 W. R. 515.

(d) *Detmold v. Detmold*, 40 Ch. Div. 585; 58 L. J. 495, Ch.; 61 L. T. Rep. N. S. 21.

(e) *Ex parte Brandon*; *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; 5 L. J. 46, Ch.

(f) *Whitfield v. Prickett*, 2 Keen, 608; 7 L. J. 187, Ch.; *Re Harvey*, 60 L. T. Rep. N. S. 710; 37 W. R. 620.

(g) *Roffey v. Bent*, L. R. 3 Eq. 759.

(h) *Ex parte Eyston*, 7 Ch. Div. 145; 47 L. J. 62, Bk.; 37 L. T. Rep. N. S. 447; 26 W. R. 181.

(i) *Trappes v. Meredith*, 7 Ch. App. 248; 41 L. J. 237, Ch.

(k) *White v. Chitty*, L. R. 1 Eq. 372; 35 L. J. 343, Ch.; *Lloyd v. Lloyd*, L. R. 2 Eq. 722.

and been received by the bankruptcy trustees while the bankruptcy was in force, the forfeiture clause will come into operation.(a)

If the first life interest in the property of both husband and wife be given to the husband, an annual sum payable thereout should be given to the wife for her separate use, and without power of anticipation.

(4) After the decease of the husband or wife, whichever may have taken the first life estate, the next trust is usually for the survivor for life; but whether the wife takes the first or the second life interest, it is still usually given for her separate use with a restraint against anticipation, as to which see *ante*, p. 16.

(5) After the decease of the survivor the trust is (i.) for such child or children, or remoter issue of the marriage, at such age or time, or ages or times, in such shares and manner as husband and wife by deed or deeds shall jointly appoint, and in default of such appointment, as the survivor by deed or will shall appoint; and in default of appointment, and so far as any appointment does not extend (ii.) in trust for all the children of the marriage who, being sons, attain twenty-one, or, being daughters, attain that age or marry under twenty-one, in equal shares, and if there be only one child the whole to be in trust for that child; and (iii.) to prevent any child taking a double portion, this last trust if followed by the hotch-pot clause, noticed *ante*, p. 419.

The power to appoint, it will be noticed, extends not only to children, but to remoter issue also; which enables an appointment to be made to the children of any child who may have died in the lifetime of the donees of the power. For a power to appoint to children does not authorise an appointment to grandchildren.(b)

This power must, however, be exercised within the time allowed by the rule against perpetuities. And in addition to what has already(c) been stated hereon, it should be added that a power to appoint to issue of the marriage will not authorise an appointment to the daughters for their separate use *with a restraint* on anticipation, such restraint being void, as being too remote.(d)

Having regard to the rule against perpetuities, it is often expressed in the power that the class who are to be the objects of the power are to be those born and taking vested interests within twenty-one years after the death of the survivor of husband and wife;(e) but these words are not necessary and are omitted by some conveyancers, as an appointment under a power not so expressly restricted will be

(a) *White v. Chitty*, sup.; *Re Loftus Ottway*, (1895) 2 Ch. 235; 64 L. J. 529, Ch.; 72 L. T. Rep. N. S. 656; 43 W. R. 501.

(b) *Alexander v. Alexander*, 2 Ves. Sn. 640; L. C. Conv. 395, 403, 3rd edit.; Sug. Pow. 664, 8th edit.

(c) *Ante*, p. 424.

(d) See Lewin, *Trusts*, 964, 10th edit.; *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Ridley*, 11 Ch. Div. 645; *Herbert v. Webster*, 15 Ch. Div. 610; 49 L. J. 620, Ch.

(e) See forms, 6 Byth. & Jar. Conv. 546, 4th edit.; 3 David. Conv. 714, pt. 2, 3rd edit.; David Conc. Pr. 428, 17th edit.; 2 Prid. Conv. 292, 17th edit.

good provided the appointment itself does not violate the rule against perpetuities.(a)

It is no longer necessary to state expressly that an appointment may be made in favour of one or more of the issue to the entire *exclusion* of the others, as by 37 & 38 Vict. c. 37, an appointment made after 30th July, 1874, is valid although some objects of the power are entirely excluded, unless a declaration to the contrary is contained in the instrument creating the power. And prior to this Act, when the power was not exclusive, the stat. 1 Wm. 4, c. 46, enabled the donee of the power to appoint a substantial share to one of the objects and a nominal share to another.

The donee of a power must exercise it *bonâ fide* for the end designed. and if he does not do so the appointment will be considered a fraud upon the power; thus in the case of a parent's power to appoint a fund among his children, if the father were to appoint a large part of the fund to a child of age, mentally and bodily diseased and likely to die, the appointment would be fraudulent and void, as being made with a view of obtaining the fund as administrator of his child.(b) But a mere suspicion that the appointor's motive was to benefit himself is not sufficient to invalidate the appointment; this must be proved by proper evidence.(c)

And the power may be released. Thus, where a father is tenant for life of settled funds, with a power to appoint to his children who are to take the fund in default of appointment, there is no duty imposed on him to make an appointment; he is not in the position of a trustee, and he may release the power, although it results in a benefit to himself, for the doctrines applicable to the fraudulent exercise of a power do not apply to a release of a power of this kind. Therefore, where in such a case the father released his power and then he and his only child of full age mortgaged their interests in the fund, and the whole mortgage money was paid to the father, the transaction was held valid.(d)

There may also be an excessive execution of a power. An appointment under a power of the kind now under consideration may be excessive in the objects, as where the power is to appoint to children and an appointment is made to grandchildren, which, as we have just seen, is void; but where there is a gift to an object of the power followed by a gift over to a person not an object, it is only void, as a rule, as to the gift over.(e)

So the power may be exceeded by annexing conditions to the gift not authorised by the power; in such a case the gift is good, and the condition, as a rule, is void, so that the appointee takes the fund absolutely. As

(a) *Routledge v. Dorril*, 2 Ves. Jur. 357; Sug. Pow. 152, 8th edit.; 3 David. Conv. 154, pt. 1, 3rd edit.; 6 Byth. & Jar. *sup.* note; 2 Prid. *sup.* note.

(b) *Wellesley v. Earl of Morington*, 2 K. & J. 143; Sug. Pow. 608, 8th edit.

(c) *M'Queen v. Farquar*, 11 Ves. 467; *Re Turner's Settlement*, 28 Ch. Div. 205; 52 L. T. Rep. N. S. 70; Sug. Pow. 616, 8th edit.

(d) *Re Somes*, (1896) 1 Ch. 250; 74 L. T. Rep. N. S. 49; 44 W. R. 236; following *Re Radcliffe*, (1892) 1 Ch. 227; 61 L. J. 186, Ch. C. A.

(e) *Brown v. Nisbett*, 1 Cox, 13; Sug. Pow. 503, 511, 8th edit.; *Re Farncombe's Trusts*, 9 Ch. Div. 652; Farwell, Pow. 306, 2nd edit.

if an appointment were made and a condition annexed to it that the appointee should release a debt owing to him, the condition would be void and the appointment absolute.(a)

An infant cannot exercise a power over real estate by deed unless it be a power simply collateral, that is, a power given to a person who has no interest in the property over which it is given;(b) but as to personal property an infant of sufficient understanding may, by deed, exercise over it a power in gross, that is, a power given to a person who has an interest in the property over which it extends, but such an interest as cannot be affected by the exercise of the power; as in the case of a tenant for life with a power of appointment to take effect after his death.(c) An infant cannot, however, execute a power of appointment by will over either real or personal estate.(d) It must be remembered that an infant on marriage may, with the sanction of the Chancery Division, make a settlement of property over which he or she has a power of appointment,(e) as already shown.

As to the mode of appointment, it is not generally desirable to appoint a specific part of the invested funds, as such an appointment tends to create confusion.(f) The appointment is generally effected by a deed poll, which usually recites the settlement, showing clearly the power to appoint to the issue, the state of the trust funds, and that the intended appointee is an object of the power, and if made on the occasion of his or her marriage, this should be recited also; the operative part follows.(g) However, recitals may be dispensed with and the power be briefly referred to in the operative part, if brevity is desired.(h)

If the appointment is made by the survivor of husband and wife, it should be ascertained, before the appointment is made, whether the appointor intends to relinquish his or her interest in the fund appointed, and if so, the deed must be varied accordingly.

Where a power is defectively executed, and the defect is not of the very essence of the power, and the person applying has a good consideration for the aid of the court, equity will grant relief against the defect. Legitimate children are among such favoured objects.(i) And by 22 & 23 Vict. c. 35, a deed executed in the presence of and attested by two witnesses is, so far as regards execution and attestation thereof, a valid execution of a power of appointment by deed; but this does not

(a) Sug. Pow. 526, 8th edit.; *Roach v. Trood*, 3 Ch. Div. 429.

(b) Sug. Pow. 47, 177, 178, 8th edit.

(c) *Re D'Angibau*, 15 Ch. Div. 228; 49 L. J. 756, Ch.; 43 L. T. Rep. N. S. 177; 28 W. R. 930.

(d) 1 Vict. c. 26, s. 7; and see *post*, tit. "Wills."

(e) 18 & 19 Vict. c. 43; *et ante*, p. 469.

(f) 3 David. Conv. 752, n. pt. 2, 3rd edit.

(g) See a form, 2 Prid. Conv. 410, 17th edit.; 3 David. Conv. 751, Pt. 2, 3rd edit.

(h) See David. Conc. Pr. 454, 17th edit.

(i) Sug. Pow. 530, 534, 8th edit.; *Tollet v. Tollet*, 2 L. C. Eq. 289, 294, 7th edit.; Farwell, Pow. 329, *et seq.*, 2nd edit.

dispense with any consent, or the performance of any other act not relating to mere execution and attestation, required by the instrument creating the power (sect. 12).

In case of the non-execution of a power, and there is no gift to the objects of the power in default of appointment, the court will not give its aid and imply such a gift, unless the power is coupled with a trust.(a)

A power of revocation and new appointment may be reserved in the instrument executing the power, although the instrument creating the power does not expressly authorise such reservation;(b) and where the power is executed by deed, unless a power of revocation is reserved in that deed, the appointment cannot be revoked, although the instrument creating the power expressly authorised a power of revocation.(c) But, of course, this does not apply to a will which is revocable until death.(d)

Where a power is given to a designated person to be executed upon a contingency, it may be executed before the contingency happens, and on the contingency happening the execution will be valid.(e)

Further, as to the trusts for the children of the marriage: after the hotchpot clause (*ante*, p. 419), the settlement, prior to the Conveyancing Act, 1881, usually contained (iv.) a clause providing for the maintenance of the children during infancy if the parents died during such period. As to the necessity of this clause since the above statute, see *ante*, p. 420.

But (v.) whether the maintenance clause be inserted or not, an advancement clause should be inserted in the settlement enabling the trustees, with the written consent of the husband and wife during their joint lives, and of the survivor during his or her life, and after the death of the survivor, at the discretion of the trustees, to raise a part, not exceeding one-half, of any child's share, vested, expectant, or presumptive, and apply it for his or her advancement or benefit.(f)

Where the parent is tenant for life his bankruptcy does not extinguish his power of consenting to the advancement, but the sanction of the trustee in bankruptcy is also necessary.(g)

(6) We now come to the last trust of the settled property, which points out the person or persons who is, or are, to take the property after the successive life interests of husband and wife and the failure of the trusts for the issue of the marriage.

As to the property brought into settlement by the husband, it is declared that it shall be held in trust for him absolutely. The wife's

(a) Sug. Pow. 588, 8th edit.; *Tollet v. Tollet*, 2 L. C. Eq. 289, *et seq.*, 7th edit.; *Harding v. Glyn*, *Id.*, p. 354, 355; *Re Weeks*, (1897) 1 Ch. 289; 66 L. J. 179, Ch.; 76 L. T. Rep. N. S. 112; 45 W. R. 265.

(b) Sug. Pow. 367, 8th edit., citing *Adams v. Adams*, Cowp. 651.

(c) *Worral v. Jacob*, 3 Mer. 256; Sug. Pow. 369, 458, 8th edit.; Farwell, Pow. 271, 2nd edit.

(d) Sug., *sup.*

(e) *Wandesforde v. Oarrick*, 5 Ir. Rep. Eq. 486; Farwell, Pow. 144, 2nd edit.; but see also *Id.*, p. 147.

(f) See *ante*, p. 421, as to this clause.

(g) *Re Cooper*, 27 Ch. Div. 565; 51 L. T. Rep. N. S. 113; 32 W. R. 1015.

property is dealt with differently, for if it were given to her absolutely, and she died before her husband intestate, such property being a reversionary *chose in action* dependent on the prior interests of her husband and the issue, would, it seems, belong to her surviving husband as her legal personal representative. (a) To avoid this it is declared that it shall be held in trust for such persons as the wife shall during coverture by will appoint, and while not under coverture by deed or will appoint, and in default of appointment, and so far as any appointment shall not extend, upon trust for the wife absolutely if she shall survive her husband, without power of anticipation; but if she should die in his lifetime, in trust for the persons who would have been entitled according to the statutes for the distribution of intestates' effects if she had died possessed thereof intestate and without having been married. (b)

If the power of appointment is not inserted in the settlement, it will be impossible for the wife to give any part of the property to her husband surviving, if she be so minded, and, in most cases, he would have as great a claim upon her as her next of kin, who may be distant relations. And as the power can, in the sketch above given, be only exercised during coverture by will, which is revocable and inoperative till death, the wife is free from any pressure put upon her by her husband during coverture. (c)

The words "next of kin according to the statutes for the distribution," &c., are used, for if next of kin simply be used, it will mean nearest blood relations in equal degree without reference to these statutes, so that if, for example, the wife leaves an only brother and a nephew, son of a deceased brother, the brother will take all to the exclusion of the nephew. (d)

It will be observed that if the wife dies in the husband's lifetime, her property is to go to her next of kin, &c., as if she had died intestate and without having been married. This is a better phrase than "if she had died unmarried." Both expressions are used to exclude the husband from taking the property on an intestacy. (e) However, "unmarried" is a word of flexible meaning, to be construed according to the plain intention of the instrument in which it is used; and may mean never having been married, or not having a husband. (f) The words "without having been married," following the limitation to the persons taking according to the

(a) See *Re Lambert*; *Stanton v. Lambert*, 39 Ch. Div. 626; 57 L. J. 927, Ch.; 59 L. T. Rep. N. S. 429; *Surman v. Wharton*, (1891) 1 Q. B. 491; 60 L. J. 233, Q. B.; 64 L. T. Rep. N. S. 866; 39 W. R. 416.

(b) See a form, 6 Byth. & Jar. Conv. 548, 4th edit.; 2 Key & E. 440, 5th edit.; David. Conc. Pr. 430, 17th edit.

(c) See 6 Byth. & Jar. Conv. 315, 4th edit.

(d) *Halton v. Foster*, 3 Ch. App. 505; 37 L. J. 547, Ch.; see also *Fielden v. Ashworth*, L. R. 20 Eq. 410; 33 L. T. Rep. N. S. 197.

(e) *Pratt v. Matthews*, 25 L. J. 686, Ch.; 4 W. R. 772.

(f) *Clarke v. Colls*, 9 H. L. Cas. 601; *Dalrymple v. Hall*, 16 Ch. Div. 715; 50 L. J. 302, Ch.; 29 W. R. 421; *Re Sergeant*; *Mertens v. Walley*, 26 Ch. Div. 575; 54 L. J. 444, Ch.; 32 W. R. 987.

statutes of distributions, will not operate to exclude children of the wife, in default of an appointment by her, (a) although the contrary has been decided. (b)

If the property brought into settlement by the wife be large, it should be considered whether it would not be advisable to introduce a provision enabling her to settle a portion of her property upon her children by a future marriage, instead of settling the whole of it on the children of the then intended marriage. For if there be only one child of such marriage, and the husband then dies, and the widow marry again, and have a large family, and the whole of her property is settled on the children of the first marriage, this one child will take the whole fund in exclusion of her children by the second marriage.

Trustee Clauses.

We have already considered the trustee clauses (c) inserted in settlements of realty. In settlements of personal property they usually are (1) the investment clause; (d) (2) the declaration that the statutory power of appointing new trustees may be vested in the husband and wife during their joint lives, and then of the survivor during his or her life; (e) and (3) where a solicitor is appointed a trustee, a clause should be inserted authorising him to charge for his professional and other services in connection with the trust, as he could have done if not appointed a trustee. For if he be not authorised to make professional charges he will only be entitled to costs out of pocket; (f) and if he is only authorised to make charges for professional services, that will entitle him to charge only for services strictly professional, and not for matters which a trustee or executor ought to have done personally without employing an agent. (g) But if the clause empowers him to charge for services not strictly professional, it is otherwise. (h)

The rule that a trustee, being also a solicitor, will not be allowed his professional charges, unless authorised by the trust instrument, has been modified, where he is a member of a firm, by recent cases. In *Cradeck v. Piper* (i) it was held that one of several trustees, being a solicitor, may be employed in an action by his co-trustees, and make the usual charges against them, provided the amount of the cost be not thereby increased. In the case of *Clack v. Carlon*, (k) it was decided that where one of a firm

(a) *Re Balls Trust*, 11 Ch. Div. 270; 48 L. J. 279, Ch.; *Upton v. Brown*, 12 Ch. Div. 872; 48 L. J. 756, Ch.; *Stoddart v. Saville*, (1894) 1 Ch. 480; 68 L. J. 467, Ch.; 42 W. R. 361.

(b) *Emmins v. Bradford*, 13 Ch. Div. 493; 49 L. J. 222, Ch.; 42 L. T. Rep. N. S. 45.

(c) See *ante*, p. 447, *et seq.*

(d) See *ante*, p. 449.

(e) See *ante*, p. 456.

(f) *Moore v. Frowd*, 3 M. & C. 45.

(g) *Re Chapple*, 27 Ch. Div. 584; 51 L. T. Rep. N. S. 748.

(h) *Re Ames*, 25 Ch. Div. 72; 32 W. R. 287.

(i) 1 M. & G. 664; 19 L. J. 107, Ch.

(k) 30 L. J. 639, Ch.; 4 L. T. Rep. N. S. 361.

of solicitors is a trustee, and he and his partner agree that the partner shall do all the work and have all the profits of the trust business, the partner may make and recover against the trust estate the usual professional charges. But the rule in *Cradock v. Piper* will not be applied to cases where the work is done out of court, (a) as the preparation of leases and agreements relating to the trust estate. (b)

Clauses as to debts, &c.—Formerly, when money secured by mortgage, or by bond, or other security not negotiable, was assigned, it was the usual practice to insert in the settlement a power of attorney authorising the trustees to sue for and recover the money due in the name of the assignor; also power to give effectual discharges for the same, and to compound and compromise any such debts, or refer to arbitration any disputes that might arise respecting them.

By the 30 & 31 Vict. c. 144, the assignee of a policy of life assurance may now sue in his own name for the amount due and payable on the death of the assignor, if the assignee has given written notice to the insurance company of the date and purport of the assignment (sects. 1, 3); and providing the assignment be duly stamped as required by 54 and 55 Vict. c. 39, sect. 118.

And by the 36 & 37 Vict. c. 66, s. 25, sub-s. 6, it is provided that an absolute assignment (not by way of charge) in writing signed by the assignor of a debt or legal *chose in action* shall (subject to all equities formerly entitled to priority over the right of the assignee) pass and transfer to the assignee the legal right to the debt or *chose in action*, and all remedies for the same, and power to give a good discharge for the same, without the concurrence of the assignor from the time that express notice in writing is given to the debtor, or person liable to the assignor.

And the Trustee Act, 1898 (56 & 57 Vict. c. 53), s. 21 (replacing 44 & 45 Vict. c. 41, s. 37), enables two or more trustees acting together, or a sole trustee if authorised by the trust instrument to execute the trusts and powers thereof, to accept any composition or security for any debt, &c., and allow time for payment, compound, abandon or submit to arbitration, &c., any debt, &c., relating to the trust, without being responsible for any loss; unless a contrary intention is expressed in the trust instrument.

Completion of the Settlement, &c.

The draft settlement having been prepared either by the solicitor for the intended wife, or by counsel from instructions furnished to him by such solicitor, a fair copy of it is made and forwarded to the solicitor for the intended husband for his approval, and if the trustees are represented by a different solicitor to the one acting for the intended wife, his perusal and approval of the settlement on their behalf will be necessary.

The draft settlement having been approved by the solicitors for the different parties, is next engrossed and sent for examination to the solicitors

(a) *Broughton v. Broughton*, 5 De G. M. & G. 160; 25 L. J. 250, Ch.; 3 W. R. 602.

(b) *Re Corsellis*, 34 Ch. Div. 675; 56 L. J. 294, Ch.; 56 L. T. Rep. N. S. 411.

for the other parties, with the fair copy draft settlement, these are returned to the intended wife's solicitor, and an appointment is made for all parties to attend and execute the settlement. The settlement, when executed, is handed over to the trustees, and the solicitor who prepared it has no lien thereon against them for his costs.(a)

If the property settled be real estate situate in one of the register counties, the settlement should be duly registered as pointed out, *ante*, pp. 157, 159. And by 56 & 57 Vict. c. 53, s. 12 (replacing 44 & 45 Vict. c. 41, s. 34), it is provided that where, by deed, a new trustee is appointed, or a retiring trustee is discharged, and trust property vested by declaration therein in new or continuing trustees (see *ante*, p. 458), then for the purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance be deemed to be made by him or them, under a power conferred by the Act.

This will make it necessary to search the deeds registry against any person having a power to appoint new trustees, as well as against the trustees.

Voluntary Settlements.

A settlement is said to be voluntary when it is made without sufficient consideration. Considerations are either good or valuable. A good consideration is such as natural love and affection, as where the settlement is made in favour of a near relation; a valuable consideration is such as money or marriage.(b) A settlement made upon good consideration is no less voluntary than one made without any consideration. The husband and wife and the issue of their marriage come within the marriage consideration, that is, they are treated as if a consideration moved from each one of them. Limitations to collaterals, or strangers, and even to the children of husband or wife by a *former* marriage are, as a rule, merely voluntary. But if limitations in their favour, and the children of the second marriage are so mixed up that it is impossible to give effect to the limitations in favour of the latter, without also giving effect to the limitations in favour of the former, it is otherwise.(c)

Though marriage is a valuable consideration, yet the settlement or articles for a settlement, in order to be within that consideration, must be executed before marriage.(d) A settlement made after marriage on a wife and children pursuant to articles entered into previous to the marriage is valid.(e)

(a) *Bowker v. Austin*, (1894) 1 Ch. 556; 63 L. J. 205, Ch.; 70 L. T. Rep. N. S. 91; 42 W. R. 265; and see *ante*, p. 402.

(b) 2 Bl. Com. 297; Vaizey, Settl. 66.

(c) *De Mestre v. West*, (1891) A. C. 264; 60 L. J. 66, P. C.; *Attorney-General v. Jacobs-Smith*, (1895) 2 Q. B. 341; 72 L. T. Rep. N. S. 714; 64 L. J. 605, Q. B.; 43 W. R. 657; explaining *Newstead v. Searle*, 1 Atk. 265.

(d) *Warden v. Jones*, 2 De G. & J. 76; *et ante*, p. 401.

(e) See *ante*, p. 401.

If, however, the marriage consideration is tainted with fraud, of which the wife is aware, it will not support the settlement against creditors. As where the marriage is not an honest marriage and is entered into solely for the purpose of attempting to make a settlement valid which would otherwise be void, and where, but for a desire to defraud creditors, no marriage would have taken place, for then the settlement, though ante-nuptial, will be set aside.(a)

And marriage, in order to form a valuable consideration for a settlement or articles, must be valid and effectual. Therefore, the marriage of an Englishman with his deceased wife's sister will not do so.(b)

The statutes which have been enacted to prevent fraudulent gifts or settlements are notably the 13 Eliz. c. 5, the 27 Eliz. c. 4 (now superseded by the Voluntary Conveyances Act, 1893, except as to past transactions). and the Bankruptcy Act, 1883.

By the 27 Eliz. c. 4, every conveyance, &c., of lands, tenements, or hereditaments made with intent to defraud or deceive purchasers is, as against them and all persons claiming under them, to be void (sect. 2). But conveyances for good consideration and *bonâ fide* are exempted from the Act (sect. 4). And by sect. 5, if the conveyance contains a general power of revocation, it is void as against a purchaser for money or other good consideration.

After this Act all voluntary settlements were held void against a subsequent purchaser from the settlor, even though the purchaser had notice of the settlement.(c) "Purchaser" was held to include a mortgagee.(d)

It has been decided that a post-nuptial settlement of leaseholds for years to which liability is attached, that is the payment of rent and performance of covenants, was in itself a conveyance for value, and not voluntary under the statute 27 Eliz. c. 4.(e) But these decisions, so far as they bear upon the 27 Eliz. c. 4, are mainly of importance as to transactions dealt with before the operation of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which enacts that no voluntary conveyance of any lands or tenements, whether made before or after the passing of the Act, if *bonâ fide* and without fraudulent intent, is hereafter to be deemed fraudulent within 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under that Act by a conveyance made upon such purchase, any rule of law notwithstanding. But if the conveyance to the purchaser for value is dealt with before the passing of 56 & 57 Vict. c. 21, such Act does not apply.

It follows that since the above Act a voluntary conveyance of lands or tenements cannot be set aside by a subsequent purchaser for value, unless

(a) *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, L. R. 8 Eq. 46; *Re Pennington*, 59 L. T. Rep. N. S. 774.

(b) See cases cited *ante*, p. 414, note (e).

(c) *Buckle v. Mitchell*, 18 Ves. 100.

(d) *Dolphin v. Aylward*, L. R. 4 H. L. 486.

(e) *Price v. Jenkins*, 5 Ch. Div. 619, C. A.; 32 W. R. 1013; *Harris v. Tubb*, 42 Ch. Div. 79.

it can be shown that it was made with a fraudulent intent. It will also be noticed that the 27 Eliz. c. 4, applied to lands and tenements only, and not to personal property.(a)

The stat. 13 Eliz. c. 5, however, remains unaffected by 56 & 57 Vict. c. 21. By this Act all gifts, grants and conveyances of lands, tenements and hereditaments, goods and chattels, and all bonds made with intent to delay, hinder, and defraud creditors, are utterly void against such creditors. But the Act does not extend to any estate or interest conveyed or assured to any person upon good (which means valuable) consideration and *bonâ fide* without notice of the fraud.

All voluntary settlements made with intent to defeat and delay creditors, that is, made by a person who at the time or shortly afterwards is indebted to such an amount that he has not sufficient to pay his debts, are void against his creditors under the above Act.(b)

And if the instrument is founded on a valuable consideration, yet if the intent to defraud creditors be clear, the instrument will be void.(c) And it seems the doctrine of *Price v. Jenkins*,(d) decided upon the Act 27 Eliz. c. 4, does not apply to the stat. 13 Eliz. c. 5.(e)

A creditor whose debt did not exist at the time a voluntary settlement was made, may apply to set such settlement aside on proof that the settlement was made with an express intention to delay or defraud creditors;(f) and even without such proof if a person owing debts makes a settlement which, after deducting the property settled, does not leave sufficient assets to pay his debts, then the law will presume an intention to defeat and delay creditors, and the settlement will be set aside at the instance of a future creditor, under 13 Eliz. c. 5.(g) It follows that a person cannot make a voluntary settlement and then engage in a hazardous trade and so defeat his future trade creditors, although all the debts which he owed at the date of the settlement had been paid.(h)

It will be noticed that the 15 Eliz. c. 5, extends not only to lands and tenements, but also to goods and chattels; and it seems the latter expression includes all kinds of personal property that may be taken in execution.(i).

(a) *Jones v. Croucher*, 1 Sim. & S. 315.

(b) *Barling v. Bishop*, 29 Beav. 417; 2 L. T. Rep. N. S. 651; *Freeman v. Pope*, *infra*; *Crossley v. Elworthy*, L. R. 12 Eq. 158; 40 L. J. 480, Ch.; *Ex parte Russell*, 19 Ch. Div. 588; 51 L. J. 521, Ch.

(c) *Holmes v. Penney*, 3 K. & J. 90; 26 L. J. 179, Ch.

(d) *Ante*, p. 488.

(e) *Re Ridler*, 22 Ch. Div. 74; 52 L. J. 343, Ch.; 48 L. T. Rep. N. S. 396; 31 W. R. 93.

(f) *Spirett v. Willows*, 3 De G. J. & S. 293.

(g) *Freeman v. Pope*, 5 Ch. App. 538; 39 L. J. 689, Ch.; 21 L. T. Rep. N. S. 816; *Ex parte Russell*, *supra*; but see *Ex parte Mercer*, 17 Q. B. Div. 290; 54 L. T. Rep. N. S. 720; 55 L. J. 558, Q. B.

(h) *Mackay v. Douglass*, L. R. 14 Eq. 106; 41 L. J. 539, Ch.; 26 L. T. Rep. N. S. 721; 20 W. R. 652.

(i) *Barrack v. McCulloch*, 3 Kay & J. 110; 26 L. J. 105, Ch.

The law which makes a voluntary conveyance void against creditors is extended by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, which provides that a voluntary settlement of the settlor's property shall, if he becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy; and also if he becomes bankrupt within ten years after the settlement, unless the voluntary grantees can prove that the settlor was at the time thereof able to pay all his debts without the aid of the property comprised in the settlement, and that such property passed thereby. And as already (*ante*, p. 476) seen, a covenant by the settlor to settle his future property is usually void against the trustee in bankruptcy (sects. 1, 2).

By sub-sect. 3, settlement includes any conveyance or transfer of property. And it has been held that a transfer or gift of valuable jewellery by a man to his wife without writing is within the section, and void on the donor's bankruptcy within two years after the gift.(a)

However, the word "void" in the section means "voidable," and a *bonâ fide* purchaser for value from a beneficiary under the settlement before the settlor's bankruptcy has a good title against the trustee in bankruptcy.(b) For the settlement is only void against the trustee in bankruptcy from the time when his title accrues, that is, from the date of the act of bankruptcy, to which period his title relates back.(c) Where a voluntary settlement is set aside under the above section as void against a trustee in bankruptcy, the property comprised in the settlement does not vest in the trustee so as to oust the right of a creditor having a charge on such property subsequent to the settlement.(d)

We have hitherto treated of a voluntary settlement as it affected purchasers for value and creditors. As to the settlor, a voluntary disposition of property is, as a rule, valid against the settlor if of full age; providing the disposition is complete and no act remains to be done by him to give effect to it.(e) But so long as it remains incomplete, as if the legal owner of consols transferable by entry in the books of the Bank of England purports to transfer them by an ordinary deed of assignment, the gift is inoperative.(f) The same result follows if the owner of leaseholds for years purports to transfer them by writing not under seal, or makes no valid declaration of trust of them.(g) For equity will not assist a volunteer by

(a) *Re Vansittart*, (1893) 1 Q. B. 181; 62 L. J. 277, Q. B.; 67 L. T. Rep. N. S. 592; *Re Tankard*, (1899) 2 Q. B. 57; 68 L. J. 670, Q. B.

(b) *Re Vansittart*, (1893) 2 Q. B. 377; 62 L. J. 279, Q. B.; 68 L. T. Rep. N. S. 233; 41 W. R. 286; *Re Brall*, (1893) 2 Q. B. 381; 62 L. J. 457 Q. B.

(c) *Re Carter and Kenderdine*, (1897) 1 Ch. 777; 66 L. J. 408, Ch.; 76 L. T. Rep. N. S. 476; 45 W. R. 484; disapproving of *Re Briggs and Spicer*, (1891) 2 Ch. 127; 60 L. J. 514, Ch.

(d) *Sanguinetti v. Stuckey's Bank*, (1895) 1 Ch. 176; 64 L. J. 181, Ch.; 71 L. T. Rep. N. S. 872; 43 W. R. 154.

(e) *Ellison v. Ellison*, 6 Ves. 656; 2 L. C. Eq. 835, 7th edit.; *Henry v. Armstrong*, 18 Ch. Div. 668.

(f) *Bridge v. Bridge*, 16 Beav. 315; *Searle v. Law*, 15 Sim. 95.

(g) *Richards v. Delbridge*, L. R. 18 Eq. 11; 43 L. J. 459, Ch.

making effectual an incomplete gift, nor enforce a mere voluntary contract in the nature of a settlement.(a) But if the legal owner of the property, instead of an ineffectual transfer had executed a valid declaration of trust, equity would compel the execution of it;(b) it is important, therefore, to keep the effect of these instruments clear. And a voluntary assignment of a reversionary interest in stock standing in the name of trustees will be upheld, as the assignor has, in this case, done all he can, having regard to the nature of the property, to divest himself of his interest therein.(c) The same rule applies to other *choses in action*, as a debt due on a policy of life assurance,(d) or on a bill of sale.(e) And if no notice of the assignment be given to the trustees of the stock,(f) or to the assurance office, or debtor, that does not render the assignment incomplete if the deed is delivered to the trustees thereof.(g) However, it must be remembered that before an assignee can sue at law in his own name for a debt or other legal *chose in action*, notice of the assignment must be given to the debtor.(h)

After a voluntary settlement is complete it cannot, in the absence of a power reserved for that purpose, be revoked or altered by the settlor,(i) unless he can show some good reason for the aid of the court, as that at the time he executed the settlement he was young or inexperienced, and had not its effect explained to him, especially if the deed contains unusual provisions.(k) The absence of a power of revocation does not of itself affect the validity of the settlement, and the absence of advice by the solicitor as to its insertion is only a circumstance to be weighed in connection with other circumstances in determining whether the settlor did or did not understand what he was doing.(l)

A voluntary assignment of property to trustees for the benefit of the assignor's creditors to whom the conveyance is not communicated, and to which they are not in any manner privy, operates merely as a direction to the trustees and is revocable by the debtor. But if the creditors have

(a) *Weale v. Olive*, 17 Beav. 252; *Ellison v. Ellison*, sup., pp. 835, 843.

(b) *Bridge v. Bridge*, sup.; *Milroy v. Lord*, 4 De G. F. & J. 264, 274; *Richards v. Delbridge*, sup.

(c) *Kekewich v. Marning*, 1 De G. M. & G. 176; 21 L. J. 577, Ch.; 2 L. C. Eq. 849, 850, 7th edit.

(d) *Fortescue v. Barnett*, 3 Myl. & K. 36; 2 L. J. 106, Ch.; 2 L. C. Eq. sup.

(e) *Re Patrick*, (1891) 1 Ch. 82; 60 L. J. 111, Ch.; 63 L. T. Rep. N. S. 752; 39 W. R. 113.

(f) *Donaldson v. Donaldson*, 1 Kay, 711; 23 L. J. 788, Ch.

(g) *Fortescue v. Barnett*, sup.; *Re Patrick*, sup.

(h) 30 & 31 Vict. c. 144; 36 & 37 Vict. c. 66, s. 25 (6); *et ante*, p. 486.

(i) *Henry v. Armstrong*, 18 Ch. Div. 668.

(k) *Phillips v. Mullings*, 7 Ch. App. 244; 41 L. J. 211, Ch.; *Dutton v. Thompson*, 23 Ch. Div. 278; 52 L. J. 661, Ch.; *James v. Couchman*, 29 Ch. Div. 212; 54 L. J. 838, Ch.; *Powell v. Powell*, (1900) 1 Ch. 243.

(l) *Toker v. Toker*, 3 De G. J. & S. 487; 32 L. J. 322, Ch.; 8 L. T. Rep. N. S. 777; *Hall v. Hall*, 8 Ch. App. 430; 42 L. J. 444, Ch.

notice of the trust and assent to it, and thus forbear to sue, it seems the trust becomes irrevocable against them.(a)

No covenants for title can be implied in a voluntary settlement, as the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) A. and B. says "in a conveyance for valuable consideration," &c. But perhaps a covenant for further assurance might be implied on the part of the settlor under E. of this section.(b)

Stamps on Settlements.

By the Schedule to 54 & 55 Vict. c. 39, under "Settlement," it is provided that any instrument, whether voluntary or upon any good or valuable consideration, other than a *bond fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or not, or to be laid out in the purchase of lands or other hereditaments or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever :

	£	s.	d.
For every 100l., and also for any fractional part of 100l., of the amount or value of the property settled or agreed to be settled	0	5	0

But an exemption is made of any instrument of appointment of property in favour of persons specially named as the objects of a power of appointment where duty has been paid in respect of the same property upon the settlement creating the power, or the grant of representation of any will creating the power. Such an instrument requires a 10s. stamp.(c)

A settlement made for a *bond fide* pecuniary consideration is chargeable with *ad valorem* duty under the head "conveyance on sale."(d)

If the settlement contains a covenant to settle after-acquired property, it is liable to a further duty of 10s. under sect. 4 (1) of 54 & 55 Vict. c. 39, as a deed.(e)

A settlement of real estate, or the proceeds of sale thereof, is not chargeable with *ad valorem* duty; for the statute only charges a settlement of a "definite and certain sum of money," &c.(f) A settlement of furniture is subject to the same exemption.(g) Such settlements will, therefore, only require a 10s. deed stamp.(h)

As to the stamp upon an instrument appointing a new trustee, see *ante*, p. 462.

(a) *Acton v. Woodgate*, 2 Myl. & K. 492; *Johns v. James*, 8 Ch. Div. 744; 47 L. J. 853, Ch.

(b) See Wolst. & B. 33, 7th edit.; and see *ante*, pp. 142, 464.

(c) Chit. Stats. vol. 12, p. 76 n. (t) 5th edit.

(d) Alpe, Stp. Duties, 196, 5th edit.; p. 204, 6th edit.; *et ante*, p. 153.

(e) Alpe, Stp. Duties, 197, 5th edit.; p. 205, 6th edit.

(f) *Re Stucley's Settlement*, L. R. 5 Ex. 85.

(g) Alpe, Stp. Duties, 197, 5th edit.; p. 205, 6th edit.

(h) Chit. Stats. vol. 12, p. 75, n. (q) 5th edit.

Where any money which may become payable upon a life policy (or upon any security not being a marketable security) is settled or agreed to be settled, the settlement or agreement is to be charged with *ad valorem* duty on that money. But if no provision is made for keeping up the policy, duty is to be charged only on the value of the policy at the date of the settlement or agreement for a settlement (54 & 55 Vict. c. 39, s. 104). If the settlement contains the ordinary covenant to pay premiums, although no fund is provided for such purpose (*ante*, p. 473), it does not come within the above proviso, and *ad valorem* duty is chargeable for the amount assured. The provision for keeping up the policy need not necessarily be in the settlement.(a)

Duty is charged in respect of any bonus that may have been added to the policy up to the date of the settlement; and the amount should be stated when the settlement is brought for adjudication.(b)

Where a settlement of the same property is composed of several executed instruments, and the *ad valorem* duty thereon exceeds 10s., only one of the instruments is to be charged with such duty (54 & 55 Vict. c. 39, s. 106, sub-s. 1). And where there is a previous agreement for the settlement upon which *ad valorem* settlement duty exceeding 10s. has been paid in respect of the property, the settlement is not to be charged with *ad valorem* duty in respect of such property (sub-sect. 2). In each of the aforesaid cases the instruments not chargeable with *ad valorem* duty are to be charged with the duty of 10s. (sub-sect. 3).

Succession and Settlement Estate Duties.

We have already(c) pointed out in what cases succession duty is payable. And by 57 & 58 Vict. c. 30 (operating after 1st August, 1894), s. 5, where property on which estate duty(d) is leviable, is settled by the will of the deceased, or having been settled by some other disposition, passes thereunder on the death of the deceased to some person not competent to dispose of the property, a further estate duty (called settlement estate duty) on the principal value of the settled property, is payable, as already shown.(e)

Power of the Divorce Court over Settlements.

By 20 & 21 Vict. c. 85, s. 45, where the court grants a divorce or judicial separation for adultery of the wife, it may, if it thinks proper, order a settlement of the wife's property for the benefit of the innocent party and of the children of the marriage, or either or any of them. And by 22 & 23 Vict. c. 61, the court, after a final decree of nullity or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is dissolved, &c.,

(a) *Alpe, Stp. Duties*, 198, 199, 5th edit. : pp. 206, 207, 6th edit.

(b) *Alpe, Stp. Duties*, 199, 5th edit.

(d) *Stated ante*, p. 105.

(c) *See ante*, p. 103.

(e) *See ante*, p. 105.

and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit: (sect. 5.) The court has jurisdiction, although there be no issue of the marriage (41 Vict. c. 19, s. 3). So where the wife refuses to comply with a decree for restitution of conjugal rights obtained by the husband, the court may order a settlement of her property: (47 & 48 Vict. c. 68, s. 3.)

On the refusal of a wife to comply with a decree obtained by the husband for restitution of conjugal rights, the court cannot order a settlement of the wife's property which is subject to a restraint on alteration.(a)

Where a marriage has been dissolved and there is no issue of the marriage, the court can order the trustees to convey the property to the settlor.(b)

Separation Deeds.

Unfortunate differences arising and continuing between husband and wife may render it desirable that they should no longer continue to live together. And irrespective of any legislative enactment a married woman can contract to live apart from her husband, and the husband is entitled to enforce specific performance of such a contract, when there is sufficient consideration for it, as the compromise of a divorce suit, and an agreement by the husband to allow his wife an annuity.(c) And the intervention of a trustee is not necessary to the validity of the contract.(d)

If husband and wife, after entering into an agreement for separation, should again resume cohabitation, that will put an end to the agreement; (e) unless there be stipulations to the contrary as to property, or unless the agreement contains provisions beyond the purview of a mere separation deed, as a permanent settlement of property.(f) And if, during such a separation, the wife is induced by the husband to allow him conjugal intercourse, that is not such a reconciliation as puts an end to the deed.(g)

The objects of a deed of separation are (1) to permit husband and wife to live apart from each other, (2) to make provision for their separate maintenance while so living apart; (3) to indemnify the husband against his wife's debts or liabilities incurred during such period; and, (4) if circumstances render it desirable, to make provision for the settlement of any property that may belong to or come to the wife. (5) If there are any children of the marriage, provision as to their custody may be made; for under 36 Vict. c. 12, s. 2, no agreement contained in a separation deed

(a) *Michell v. Michell*, (1891) P. 208; 64 L. T. Rep. N. S. 607; 39 W. R. 680.

(b) *Meredyth v. Meredyth*, (1895) P. 92; 64 L. J. 54, Pr.; 72 L. T. Rep. N. S. 898; 43 W. R. 304; *Wynne v. Wynne*, 78 L. T. Rep. N. S. 796.

(c) *Hart v. Hart*, 18 Ch. Div. 670; 50 L. J. 697, Ch.; *Basant v. Wood*, 12 Ch. Div. 605; 40 L. T. Rep. N. S. 445.

(d) *McGregor v. McGregor*, 21 Q. B. Div. 424; 57 L. J. 591, Q. B.; 37 W. R. 45, C. A.

(e) *Nicol v. Nicol*, 31 Ch. Div. 524; 55 L. J. 437, Ch.; 54 L. T. Rep. N. S. 470.

(f) *Ruffles v. Alston*, L. R. 19 Eq. 539.

(g) *Rowell v. Rowell*, 81 L. T. Rep. N. S. 429, C. A.; 69 L. J. 55, Q. B.; (1900) 1 Q. B. 9.

between the father and mother of an infant or infants is to be invalid by reason only of its providing that the father shall give up the custody or control of the infant or infants to the mother. But the court is not to enforce such agreement if it is of opinion that it will not be for the benefit of the infant or infants.(a)

The several parts of such a deed would consist of (1) the date, (2) the parties, the husband of the first part, the wife of the second part, and a trustee of the third part; (3) the recitals, stating the agreement for separation and such other facts as the circumstances of the case require; (4) the testatum containing the following clauses: (i.) husband and wife to live separate from each other, and neither to take proceedings for restitution of conjugal rights or molest the other. (ii.) Husband to pay to the trustee for the wife a yearly sum during the period of separation for her separate use, &c.; unless she is already sufficiently provided for by settlement or otherwise. (iii.) If the wife does not come within the provisions of the Married Women's Property Act, 1882,(b) the husband should covenant to settle any property of the wife's upon her; and (iv.) the trustee should covenant to indemnify the husband against the wife's debts incurred during the period of separation.(c) As to custody of children, see *supra*.

(a) See also 49 & 50 Vict. c. 27, s. 5.

(b) See *ante*, pp. 15, 403.

(c) See a form, 2 Key & E. 438, 6th edit.: 2 Prid. Conv. 431, 16th edit.; David. Conv. 667, pt. 2, 3rd edit.

CHAPTER XI.

WILLS.

General Remarks.

It is admitted that the preparation of an intricate will is one of the most difficult tasks performed by a draftsman, partly because testators are, to a great extent, at liberty to indulge their own wishes, and partly because a will only operates from the testator's death, and must, therefore, to some extent contemplate not only existing circumstances, but those which may be subsisting at his death.(a)

A will is a written instrument by which a person makes a disposition of his property to take effect after his death.(b)

By 1 Vict. c. 26, s. 1, the word "will" is to extend to a testament and to a codicil and to an appointment by will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of a child.

A will may be made conditional upon the happening of an event. But it is difficult to state what is or is not, in the opinion of the court, a conditional will.(c)

A will should be written on paper or parchment, and it is better, to prevent any question as to its authenticity, that the writing should throughout be by the same hand, and in ink of the same colour.(d) It may be written in pencil;(e) but this is not desirable,(f) and where a printed form was filled up partly in ink and partly in pencil, the words in pencil were held to be deliberative only, and were excluded from probate.(g)

A will may consist of several testamentary documents, unless a later document expressly, or in effect, revokes a former document by being

(a) See 4 David. Conv. p. 1, 3rd edit.; Hayes & Jar. Conc. Wills, 112, 11th edit.; *Re Wait*, 30 Ch. Div. 617, 622; 54 L. J. 1172, Ch.

(b) Jarm. Wills, 18, 5th edit.

(c) See *In bonis Porter*, L. R. 2 Pr. & D. 22; *Lindsay v. Lindsay*, Id., 459; *In bonis Spratt*, (1897) P. 28; 66 L. J. 25 P. & D.; 75 L. T. Rep. N. S. 518; 45 W. R. 159.

(d) Hayes & Jar. Conc. Wills, 8, 10th edit.

(e) Sug. B. P. Stats. 351, 352; 1 Jarm. Wills, 18, 5th edit.

(f) *Bateman v. Pennington*, 3 Moo. P. C. 227.

(g) *In bonis Adams*, L. R. 2 P. & D. 367.

inconsistent therewith.(a) And a will may so refer to some other document as to cause such document to be incorporated with and to form part of the will. Thus a document which is not duly attested, if clearly referred to in a subsequent will or codicil duly executed and attested, may be incorporated and made part of the will.(b) Two things are necessary to incorporation: (1) the will must refer to some document as *then* in existence; except where the will, if read as speaking at the date of the execution of a codicil thereto, contains language which would operate as an incorporation of the document to which it refers, for then the document, though not in existence until after the execution of the will, is entitled to probate by force of the codicil. And (2) the document must be identified with the description in the will. If the will does not describe the document as then in existence, parol evidence will not be admitted to prove its existence.(c) But where the document is referred to in such terms as make it capable of identification, parol evidence may be admitted for such purpose.(d)

It is not necessary to the validity of a will that it should assume a particular form or be couched in technical language; it is sufficient if it discloses the intention of the testator respecting the posthumous destination of his property.(e) A testator's intentions are to be gathered from the whole of his will taken together; and in order to determine his meaning the court must read his language in the sense which he appears to have attached to it; with this qualification, that where a rule of law has affixed a certain definite meaning to technical expressions, that meaning must be given to them, unless the testator by his will has beyond doubt excluded such construction.(f)

Any instrument executed in the manner required by the Statute of Wills may take effect as a will, provided the intention was clear that it should not operate till after the testator's death, *ex. gr.*, a deed poll.(g)

Instructions for a Will.

Notwithstanding the foregoing remarks, a solicitor in taking instructions for and preparing a will should bestow such care and pains as will prevent

(a) *Allen v. Maddock*, 11 Moo. P. C. 427; 31 L. T. Rep. O. S. 359; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *In bonis Griffith*, 2 Id., 457; *In bonis Petchell*, 3 Id., 153; *In bonis Hodgkinson*, (1893) P. 339; 62 L. J. 116, P. & D.; 69 L. T. Rep. N. S. 540.

(b) *Allen v. Maddock*, *supra*; *In bonis Mercer*, L. R. 2 P. & D. 30.

(c) *In bonis Sunderland*, L. R. 1 P. & D. 198; *Singleton v. Tomlinson*, 3 App. Cas. 404; 38 L. T. Rep. N. S. 653; 26 W. R. 722; *In bonis Truro*, L. R. 1 Pr. & D. 201; 35 L. J. 89 Pr. & D.; *In bonis Rendle*, 68 L. J. 125 Pr. & D.

(d) *Allen v. Maddock*, *supra*.

(e) *Whyte v. Pollok*, 7 App. Cas. 400, 409; 1 Jarm. Wills, 19, 5th edit.; *In bonis Colyer*, 14 Pr. Div. 48; 60 L. T. Rep. 368; 37 W. R. 272.

(f) *Towns v. Wentworth*, 11 Moo. P. C. 526; *Scale v. Rawlins*, 61 L. J. 421, Ch.; 66 L. T. Rep. N. S. 524; (1892) A. C. 342.

(g) *Habergham v. Vincent*, 2 Ves. Jr. 228; *Re Robson*, 51 L. J. 337, Ch.; 45 L. T. Rep. N. S. 418; 30 W. R. 257.

the numerous questions which often arise upon wills, and thus avoid the expense incident to the determination of such questions.(a)

Instructions for a will should, if possible, be taken from the testator himself. The solicitor should, in all ordinary cases, ascertain the following particulars :

(1) That the testator is of full age, and is mentally capable of making the testamentary dispositions contemplated; also whether married or unmarried, and if married when, so that any question as to the wife's right to dower, or otherwise, may be settled.

(2) The next question is (i.) of what the testator's property consists; and (ii.) what is his testamentary power over it, whether it is settled, or incumbered by mortgages or other charges; also (iii.) whether he has contracted to sell any part of his real estate, or to purchase any real estate. (iv.) Whether any special directions as to the payment of debts, including mortgage debts, if any, are desired or necessary. (v.) Whether any part of the testator's property is partnership or joint property; and whether provision is to be made for carrying on his business, if any, or if it is to be wound up and disposed of by the executors.

(3) Next, who are to be the objects of the testator's bounty and in what shares and proportions they are to take, how children, if any, are to be provided for, and whether daughters' shares are to be settled for their separate use, with a restraint on anticipation, and whether legacies are to be free from duty or not.

(4) Who are to be the executors and trustees of his will.

Having ascertained these particulars, the solicitor should reduce the instructions for the will into writing, and as a matter of precaution, and to prevent any dispute afterwards arising as to what were the testator's intentions, he may get his client to sign the instructions.

And it is advisable when a testator is *in extremis* that the instructions should, if adequately expressed to convey the testator's intentions, be not only signed by the testator, but duly attested, in order to guard against sudden death, or incapacity before the formal instrument can be prepared and executed.

From these instructions the formal will is prepared, either by the solicitor himself, or by counsel on having such instructions laid before him by the solicitor. We will now take the foregoing points *seriatim*.

The Capacity of the Testator.

Infants.—By 1 Vict. c. 26, no will made by any person under the age of twenty-one years is valid (sect. 7). And the will of an infant does not become operative by his subsequently attaining his majority.(b) Nor can he now appoint a guardian by will for his own infant children under 12 Car. 2, c. 24. However, under sect. 11 of 1 Vict. c. 26, which

(a) *Re Wait*, 30 Ch. Div. 617, 622; 54 L. J. 1172, Ch.; 53 L. T. Rep. N. S. 336; 33 W. R. 930.

(b) *Hayes & Jar. Conc. Wills*, 7, 10th edit.

enables a soldier on active service or a seaman at sea to make a will of personalty as he might have done before the Act, an informal will made by a seaman on board ship was admitted to probate, although the testator was under twenty-one years of age.(a)

Idiots, &c.—The will of an idiot is void. So mental imbecility, whether occasioned by great age, or drunkenness, or other cause, may destroy testamentary power.(b) The validity of a lunatic's will depends upon the state of his mind at the time the will was made; for if it is proved that the will was made during a lucid interval, it will be valid.(c) But a diseased state of mind once proved to have established itself will be presumed to continue, and the burden of proving a lucid interval or soundness of mind is upon the party setting up the instrument.(d)

A person may be partially insane and yet may have a disposing mind; for monomania, or delusions not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will; but if the delusions so influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made, it is otherwise.(e)

Closely allied to unsoundness of mind is that of undue influence over a weak mind. But the influence to set aside a will must really amount to coercion. It must not be the influence of affection or attachment.(f)

A person who is born deaf, dumb, and blind cannot make a will, though blindness or deafness alone will not render a person incapable of making a will.(g)

Married Women.—Irrespective of legislative enactment, a married woman, if of full age, may in equity make a will of personal property settled to her separate use,(h) or of real estate settled to her separate use in fee simple.(i) She may also exercise a power of appointment by will vested in her over either real or personal estate.(k)

She may also by will dispose of goods vested in her as executrix.

(a) *In bonis M'Murdo*, L. R. 1 Pr. & D. 540; and see *post*.

(b) *Hayes & Jar. Conc. Wills*, 76, 78, 10th edit.; 7 Byth. & Jar. Conv. 329, 4th edit.

(c) *Kemble v. Church*, 3 Hagg. 278.

(d) *Smith v. Tebbitt*, L. R. 1 Pr. & D. 398.

(e) *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Smees v. Smees*, 5 Pr. Div. 84; *Pilkington v. Gray*, (1899) A. C. 401; 68 L. J. 63, P. C.

(f) *Will. Exors.* 40, 9th edit.; *Hall v. Hall*, L. R. 1 P. & D. 481; 37 L. J. 40 P. & D.; *Wingrove v. Wingrove*, 11 Pr. Div. 81; 55 L. J. 7, Pr. & D.; 34 W. R. 260.

(g) See *Jarm. Wills*, 35, 5th edit.; and see *Re Francis Owston*, 31 L. J. 177, P. & D.; 6 L. T. Rep. N. S. 368.

(h) *Jarm. Wills*, 40, 5th edit.

(i) *Taylor v. Meads*, 4 De G. J. & S. 597; 13 W. R. 394; 12 L. T. Rep. N. S. 6.

(k) *Sug. Pow.* 168, 8th edit.; *Willock v. Noble*, *infra*; *Taylor v. Meads*, *sup.*; *Hawksley v. Barrow*, L. R. 1 P. & D. 147.

And, even before the operation of the 45 & 46 Vict. c. 75, the husband might authorise his wife to dispose of her personal estate by will, in the event of her decease in his lifetime. And such a will was valid and binding on the husband if he allowed it to be proved. But during the wife's lifetime, and even after her death until probate of the will, this authority might be revoked. And if the husband should have died before the wife, such a will would not have been binding on the wife's next-of-kin.(a) And as since the Pr. R., March 29, 1887 (rules 15, 18), probate of the will of a married woman takes the form of an ordinary grant, without any exception therein, a grant to a husband of probate of the will of his wife does not operate as an assent to the will of property which she could not dispose without such assent; that is, property which was not her separate property, or over which she had no power of appointment.(b)

A married woman was also enabled to make a will if her husband was banished by Act of Parliament.(c)

And under 20 & 21 Vict. c. 85, ss. 21, 25; and 58 & 59 Vict. c. 39 (Divorce and Matrimonial Causes Acts), a married woman may acquire the status of a *feme sole* with respect to property, as shown *ante*, p. 14.

And under the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, a married woman is capable of acquiring, holding, and disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee. See also sects. 2 and 5, stated *ante*, pp. 15, 404.

It will be noticed that under sect. 5 of the Act the *title* must accrue after the Act, as fully shown *ante*, p. 404.

The execution of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under the Act (sect. 4).

It was held on the construction of sect. 1 of the above Act that it gives a married woman power to dispose by will only of property of which she is possessed while she is under coverture. And that notwithstanding sect. 24 of 1 Vict. c. 26 (which makes a will speak from her death), her will made during coverture is not effectual to pass property acquired by her after the coverture has ceased, unless the will is re-executed after that event.(d) The 56 & 57 Vict. c. 63, however, enacts that sect. 24 of 1 Vict. c. 26, is to apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled

(a) Will. P. P. 423, 9th edit.; Jarm. Wills, 40, 41, 5th edit.; *Willock v. Noble*, L. R. 7 H. L. Cas. 580; Will. Exors. 48, 9th edit.

(b) *Re Atkinson*, 78 L. T. Rep. N. S. 317; 80 *Id.*, 505, C. A.; 68 L. J. 404, Ch.; (1899) 2 Ch. 1.

(c) Theob. Wills, 16, 3rd edit.

(d) *Re Price*; *Stafford v. Stafford*, 28 Ch. Div. 709; 52 L. T. Rep. N. S. 430.

to any separate property at the time of making her will, without its being re-executed after her husband's death (sect. 3).

This enactment applies to wills made before if the testatrix dies after the passing of the Act.(a)

The 43 Geo. 3, c. 108, authorises gifts by will of real or personal property of a limited value for erecting churches, &c., notwithstanding the Mortmain Acts, but it expressly excludes women covert without their husbands from making such gifts; and this disability is not removed by the Married Woman's Property Act, 1882.(b)

Felons.—Persons attainted of or outlawed for high treason, petty treason, or felony, could not effectively make a will. Since the 54 Geo. 3, c. 145, it would seem that a felon, except in case of treason or murder, might dispose of an estate in lands to commence after his death. And since the 33 & 34 Vict. c. 23 (set out *ante*, p. 23), attainder, escheat, and forfeiture for treason or felony are abolished (sect. 1). Subject, therefore, to the temporary estate of the administrator (sect. 9), and the charges imposed by the Act (sects. 13 to 16), the real and personal property of a traitor or felon remains his own (sect. 18), and he may, it seems, dispose of it by will; for the prohibition against alienation during the time that he is subject to the Act (sect. 8) can have no application to his will, whensoever executed; a will being no alienation until after the testator's death.(c)

However, sect. 1 of the Act provides that it shall not affect forfeiture consequent upon outlawry. This is now confined to criminal outlawry, as by 42 & 43 Vict. c. 59, s. 3, outlawry in a civil action is abolished, and by 56 & 57 Vict. c. 53, s. 48, trust and mortgage estates do not pass to the administrator of a convict under 33 & 34 Vict. c. 23.

Aliens.—An alien may now make a valid will, as the 33 Vict. c. 14, provides that real and personal property of every description (except a share in a British ship) may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject.

Contracts to Devise.—Contracts to devise lands have been enforced against persons claiming such lands under the party contracting to make the devise,(d) but the contract must be in writing.(e) And the court will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment, which the donor of the power intended should be capable of execution to the moment of the donee's death.(f)

(a) *Re Wylie*, (1895) 2 Ch. 116; 64 L. J. 613, Ch.; 43 W. R. 475.

(b) *Re Smith; Clements v. Ward*, 35 Ch. Div. 589; 56 L. J. 726, Ch.; 56 L. T. Rep. N. S. 850; 35 W. R. 663.

(c) 1 Jarm. Wills, 46, 47, 5th edit.; Theob. Wills, 20, 4th edit.

(d) Fry, Sp. Perf. 106, 3rd edit.; *Synge v. Synge*, (1894) 1 Q. B. 466; 63 L. J. 202, Q. B.; 70 L. T. Rep. N. S. 221.

(e) *Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J. 737, Q. B.; 49 L. T. Rep. N. S. 303; and see *ante*, p. 401.

(f) *Re Parkin; Hill v. Schwarz*, (1892) 3 Ch. 510; 62 L. J. 55, Ch.; 67 L. T. Rep. N. S. 77; 41 W. R. 120.

Of the Execution of a Will.

Having treated of the testator's capacity to make a will, we now come to show how a will is to be executed and attested.

The 1 Vict. c. 26, enacts that no will is to be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator; but no form of attestation is necessary (sect. 9).

The strictness with which the courts construed the words "at the foot or end thereof" caused many wills to be rendered void. An Act (15 & 16 Vict. c. 24) was therefore passed to remedy this, and it provides that a will shall be valid if the signature is placed at or after, or following, or under, or beside, or opposite to the end of the will, if it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and the will is not to be affected by the circumstance that the signature does not follow or be immediately after the foot or end of the will, or that a blank space intervenes between the concluding word of the will and the signature, or because the signature is placed among the words of the testimonium clause or attestation clause, &c., or follows, or is under, or beside the names or one of the names of the subscribing witnesses, or because the signature is on a side, or page, or portion of the paper or papers containing the will whereon no clause or disposing part of the will is written above the signature, or because there appears to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written to contain the signature, &c. But no signature is to give effect to any disposition or direction which is underneath, or which follows it, or which is inserted after the signature was made.(a)

Testator's Signature.—The mark of a testator is a sufficient signature.(b) So where a testator is from illness unable to write, his hand may be guided.(c)

Sect. 9 of 1 Vict. c. 26, provides that the signature may be made by some other person in the testator's presence and by his direction. But it would seem desirable that the testator should make his mark instead. Where a person signed for the testator in his own name, stating that he did so for the testator, that was held a sufficient compliance with the Act.(d)

If the will consists of several sheets of paper, it is not necessary that

(a) See hereon *Hunt v. Hunt*, L. R. 1 P. & D. 209; *In bonis Archer*, L. R. 2 P. & D. 252; *In bonis Wotton*, L. R. 3 P. & D. 159; *In bonis Gilbert*, 78 L. T. Rep. N. S. 762; *In bonis Gee*, Id., 843.

(b) *Baker v. Dening*, 8 A. & E. 94.

(c) *Wilson v. Beddard*, 12 Sim. 28; 10 L. J. 305, Ch.

(d) *Re Clark*, (1839) 2 Curt. 329.

the testator should sign each sheet,(a) but it is usual to do so, and for the attesting witnesses to sign or initial each sheet. In a case where a testator signed his name on the tenth and last sheet and placed his initials on the first nine sheets, and two witnesses signed their names on the first nine sheets but not on the tenth, it was held that the operative signature was not duly attested, and the execution was incomplete.(b)

The Acknowledgment.—It will be noticed that the testator's signature must be made or acknowledged by him in the presence of both witnesses present at the same time.(c) If the instrument be acknowledged to be the testator's will, and the witnesses see his signature, that is sufficient.(d) And if the signature of the testator be on the will, and the witnesses see it and then attest the will, it is sufficient, although the document is not expressly stated to be testamentary.(e)

But if the signature of the testator is covered up so that the attesting witnesses do not see it, although it is there, that is not a sufficient acknowledgment.(f)

The acknowledgment must be made to both witnesses when actually present at the same time.(g)

The Witnesses.—The witnesses must attest and subscribe the will in the presence of the testator (1 Vict. c. 26, s. 9). It will satisfy the words of the section, however, if the testator is in such a position that he might, if he had looked, have seen the witnesses as they subscribed.(h)

The Act does not enact that the witnesses must subscribe in the presence of each other as well as in the presence of the testator. It seems, however, a proper and safe course for this to be done.(i)

The witnesses may subscribe by name, or by initials, or by some mark intended to represent the name.(k)

The witnesses must also subscribe with the intention of attesting the testator's signature.(l)

(a) Theob. Wills, 25, 4th edit.; Hayes & Jar. Wills, 24, 11th edit.

(b) *Phipps v. Hale*, L. R. 3 Pr. & D. 166; see also *In bonis Pearse*, L. R. 1 Pr. & D. 382.

(c) 1 Vict. c. 26, s. 9; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 4 L. T. Rep. N. S. 125; *Wyatt v. Berry*, (1893) P. 5; 62 L. J. 28, P. & D.; 68 L. T. Rep. N. S. 416.

(d) *In bonis Dinmore*, 2 Rob. 641.

(e) *Daintree v. Butcher and Fasula*, 13 Pr. Div. 102; 58 L. T. Rep. N. S. 661.

(f) *Hudson v. Parker*, 1 Rob. 14; *Blake v. Blake*, 7 Pr. Div. 102.

(g) *Wyatt v. Berry*, *supra*.

(h) *Casson v. Dade*, 1 Br. C.C. 99.

(i) See *Moore v. King*, 3 Curt. 243; *Hindmarsh v. Charlton*, *sup.*; *Wyatt v. Berry*, *sup.*; but see Theob. Wills, 29, 4th edit.; Hayes & Jar. Conc. Wills, 19, 11th edit.

(k) *Hindmarsh v. Charlton*, *sup.*; *In bonis Blewitt*, 5 Pr. Div. 116; *Margary v. Robinson*, 12 Pr. D. 8.

(l) *In bonis Wilson*, L. R. 1 Pr. & D. 269; *Griffiths v. Griffiths*, L. R. 2 Pr. & D. 300.

Although 1 Vict. c. 26, permits acknowledgment of his signature by a testator, it allows no such latitude in the case of an attesting witness.(a)

As to the competency of the witnesses: the 1 Vict. c. 26, provides that the incompetency of any witness to a will at the time of the execution or at any time afterwards shall not invalidate the will (sect. 14). But if any person attests the execution of any will to whom, or to whose wife or husband, any beneficial interest is thereby given (except a charge for the payment of debts), the gift is void; the person so attesting is, however, a good witness to prove the execution of the will, or to prove the validity or invalidity thereof (sect. 15). A creditor is also a good attesting witness to the execution of a will, although the will contains a charge for the payment of debts (sect. 16). So are the executors of the will (sect. 17).

We shall in subsequent pages have occasion to again refer to gifts to attesting witnesses.

By sect. 10 of the Act an appointment by will in exercise of a power is not to be valid unless executed as required by sect. 9 (*supra*); but if so executed, it, so far as respects the execution and attestation thereof, is a valid execution of the power, although it shall have been expressly required that it should be executed with some additional or other form of execution or solemnity.

A power to appoint by writing under hand and seal is not well exercised by the will of the donee of the power, executed and attested as provided by sect. 9, but not sealed.(b) However, a power to appoint by "deed or instrument in writing, to be signed, sealed, and delivered in the presence of," &c., was held well exercised by a will duly executed and attested and also sealed, although the attestation clause did not state that it had been delivered (c)

Where a will or codicil appears on its face to have been duly executed and attested, and is so found in the testator's possession after his death, the principle *omnia presumuntur rite esse acta* applies, even though the attesting witnesses may have no recollection of having seen the testator sign the will or codicil when they signed their names.(d)

However, in the case of a testator who is blind, then in addition to the usual formalities, the will should before execution be read over to him, and this fact should be stated in the attestation clause. For otherwise this fact, or that the testator knew the contents of the will, must be proved before probate will be granted.(e) And it seems that the

(a) *In bonis Maddock*, L. R. 3. Pr. & D. 169; *Horne v. Featherstone*, 73 L. T. Rep. N. S. 32.

(b) *Taylor v. Meads*, 4 De G. J. & S. 597; 12 L. T. Rep. N. S. 6; 34 L. J. 203, Ch.; 13 W. R. 394.

(c) *Smith v. Adkins*, L. R. 14 Eq. 402; 41 L. J. 628, Ch.; 20 W. R. 717; 27 L. T. Rep. N. S. 90.

(d) *Wright v. Sanderson*, 9 Pr. Div. 149; 53 L. J. 49, P. & D.; 50 L. T. Rep. N. S. 769; 32 W. R. 560, C. A.

(e) Prob. R. 1862, r. 71, N. C.

witnesses must be in such a position, at the time of attesting, that the testator, if not blind, could have seen them.(a)

It will be noticed that sect. 9 of 1 Vict. c. 26, enacts that "no form of attestation shall be necessary." A form of attestation is, however, generally used, showing that the requisites of the section have been complied with. And if such a form be not used the Probate Court may require an affidavit from an attesting witness that the will was duly executed before granting probate of the will.(b)

Soldiers and Seamen.—Sect. 11 of the Act provides that any soldier in actual military service, or any mariner or seaman at sea, may dispose of his *personal* estate as he might have done before the Act.

Any of the privileged persons may make a will by any testamentary paper, and whether signed by him or not, provided it can be shown that such paper was to take effect as the testator's will.(c)

An informal will made by a mariner serving on board of one of Her Majesty's ships while she was permanently stationed in Portsmouth Harbour was held to come within sect. 11;(d) so does an informal will made by a seaman on board a ship lying in a river before sailing.(e)

A surgeon in the Navy is a "seaman," and comes within the section. And when coming home invalided he, while a passenger on board a steamship, wrote a letter containing directions as to the manner in which he wished his property to be disposed of; and this was admitted to probate.(f)

By 28 & 29 Vict. c. 72 (amended by 60 & 61 Vict. c. 15), a will by a person made before entry as a seaman or marine, is to be ineffectual to pass wages, prize money, or effects in the charge of the Admiralty (sect. 3). And a will by such a seaman or marine combined with a power of attorney is invalid (sect. 4). And a will made by a person while serving as a seaman or marine is not to be valid to pass such wages, prize money, &c., unless made in conformity with the provisions of the Act (sect. 5), as amended by 60 & 61 Vict. c. 15, to which the reader is referred.

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines, or marine, or other person forming part of the complement of any of Her Majesty's vessels, &c., exclusive of commissioned, warrant and subordinate officers, and assistant engineers, and of kroomen (sect. 2).

And by 57 & 58 Vict. c. 60, s. 177, the Board of Trade may refuse to deliver the property of any deceased merchant seaman to a person claiming them under a will made on board ship, unless the will is in writing, signed or acknowledged by the testator in the presence of, and attested by, the master or first mate.

(a) *In bonis Piercy*, (1845) 1 Rob. 278; Will. Exors. 81, 9th edit.

(b) Pr. R. 1862, amended January, 1871, r. 4, N. C.; Coote and Tr., Pr. 83, 12th edit.

(c) Theob. Wills, 52, 4th edit.

(d) *In bonis M'Murdo*, L. R. 1 Pr. & D. 540; *et ante*, p. 498.

(e) *In bonis Patterson*, 79 L. T. Rep. N. S. 123.

(f) *In bonis Saunders*, L. R. 1 P. & D. 16.

Will of British Subject made Abroad, &c.—1. By 24 & 25 Vict. c. 114, every testamentary instrument made *out* of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the death) shall, as regards *personal* estate, be held to be well executed for the purpose of being admitted to probate, if made (1) according to the forms(*a*) required either by the law of the place where made, or (2) by the law of the place where the person was domiciled when the same was made, or (3) by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin.

2. Every testamentary instrument made *within* the United Kingdom by a British subject (whatever his or her domicil, &c.), shall, as regards *personal* estate, be held to be well executed, and be admitted to probate, if executed according to the forms required by the laws in force in that part of the United Kingdom where the same is made.

3. No testamentary instrument shall be held to be revoked, or become invalid, &c., by reason of any subsequent change of domicil of the person making the same.

The Act is confined to the wills of British subjects. Therefore where an Englishwoman married a German subject and acquired a domicil abroad, and after her husband's death made a will valid according to English law, but not according to the law of Germany, it was held not entitled to probate here; for she had become a German subject.(*b*)

The Act does not, it has been held, repeal sects. 9 and 10 of 1 Vict. c. 26; therefore, if a will is made by a person residing abroad, in exercise of a power of appointment over personalty, the will must be executed and attested(*c*) as required by those sections, or it will not operate as an exercise of the power.(*d*) However, there are decisions to the contrary.(*e*)

Domicil.—The disposition of real estate, including leaseholds, is governed by the law of the country where the property is situate, *lex loci*; but that to *mobilia* (subject to the Stat. 24 & 25 Vict. c. 114, as to wills of British subjects) is governed by the domicil of the last owner, *lex domicillii*, at the time of his death.(*f*)

A person *sui juris* may give up the domicil of his origin, that is, the domicil which he receives at his birth, for the domicil of his choice, which

(*a*) See *Stokes v. Stokes*, 67 L. J. 55 P. & D.; 78 L. T. Rep. N. S. 50.

(*b*) *Blowam v. Favre*, 9 Pr. Div. 130; 53 L. J. 26 P. & D.; 50 L. T. Rep. 766; 32 W. R. 673, C. A.

(*c*) See *ante*, pp. 502, 504.

(*d*) *Re Kirwan's Trusts*, 25 Ch. Div. 373; 52 L. J. 952, Ch.; 49 L. T. Rep. N. S. 292; *Hummell v. Hummell*, (1898) 1 Ch. 642; 78 L. T. Rep. N. S. 518; 67 L. J. 363, Ch.

(*e*) *D'Huart v. Harkness*, 34 Beav. 324; *Re Price*, (1900) 1 Ch. 442; 69 L. J. 225, Ch.

(*f*) Dicey on Dom. 10, 25, 36, 150; *Feeke v. Lord Carbery*, L. R. 16 Eq. 461; *Duncan v. Lawson*, 41 Ch. Div. 394; 58 L. J. 502, Ch.; 37 W. R. 524; *Hayes & Jarm. Conc. Wills*, 491, 497, 11th edit.

he may acquire by the combination of residence and intention of permanent residence. The domicile of a married woman, during coverture, is that of her husband.(a) But when the domicile of choice is abandoned, the domicile of origin revives.(b)

The 24 & 25 Vict. c. 121, enables Her Majesty by convention with any foreign State to make the provisions of the Act as to domicile apply to the subjects of Her Majesty and such foreign State respectively.

Alterations in Wills.

Where material alterations appear on the face of a will, then, in the absence of all direct evidence in regard thereto, the presumption of law is that they were made *after* the execution of the will.(c) But trifling interlineations in a will incomplete without them, if written in the same ink as the will, may be presumed to be made before execution.(d)

When alterations are made in a will *before* execution they should, as a proper precaution, be marked in the margin by the initials of the testator and witnesses, and if material, be referred to in the attestation clause. Indeed, important alterations, if not duly executed or noticed in the attestation clause, must be proved to have existed in the will before execution.(e)

As to alterations *after* execution, the 1 Vict. c. 26, s. 21, enacts that no obliteration, interlineation, or other alteration made in a will after execution thereof, is to be valid (except so far as the words or effect of the will before such alteration be not apparent), unless the alteration be executed like a will; but the will with such alteration as part thereof is to be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.(f)

It has been held that the initials of a testator and of the attesting witnesses in the margin of the will opposite interlineations are sufficient to render them valid.(g)

Where a question arises whether alterations on the face of a will were made before or after execution, the statements of a testator as to his testamentary intentions made before the execution of the will may be given in evidence.(h)

(a) Dicey on Dom. 1, 7.

(b) *Udny v. Udny*, L. R. 1 H. L. Cas. Sc. 441; *Re Marret*, 36 Ch. Div. 400; 57 L. T. Rep. N. S. 896, C. A.

(c) *Cooper v. Bockett*, 4 Moo. P. C. 419.

(d) *In bonis Cadge*, L. R. 1 Pr. & D. 543; *In bonis Hindmarch*, Id., 307.

(e) Prob. R. 1862, r. 9, N. C.

(f) See also Prob. R. 1862, r. 10, N. C.

(g) *In Bonis Blowitt*, 5 Pr. Div. 116.

(h) *Doe v. Palmer*, 15 Q. B. 747; 20 L. J. 367, Q. B.; *Dench v. Dench*, 2 Pr. Div. 60.

As to obliterations in a will by having pieces of paper pasted over disposing parts of the will, see *Ffinch v. Combe*.(a)

Revocation of Wills.

A will is in all cases revocable.(b) But a covenant not to revoke a will is a lawful covenant, for the breach of which an action for damages will lie.(c) And it has been held that where a verbal representation of an intended absolute gift of property is made in order to influence the conduct of another, and is acted upon by that person, though it is of the essence of the representation that the gift be made by a revocable instrument, the gift is rendered irrevocable.(d) But this decision has been disapproved of, and can no longer be relied upon.(e)

By 1 Vict. c. 26, s. 18, every will made by a man or a woman is revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, executor, or administrator, or next of kin, under the statute of distributions).

If by the same will a testator disposes of his own property, and also exercises a power falling within the exception, the will will be revoked by his subsequent marriage, so far as relates to the testator's own property, but not so far as it relates to the property subject to the power.(f)

As to the exception, a will made in exercise of a power of appointment is not revoked by a subsequent marriage, when the property of which it disposes passes in default of appointment under the instrument containing the power, although the same persons would take under such instrument as would have taken in case of intestacy under the Statute of Distributions.(g)

By sect. 19, no will is to be revoked by any presumption of an intention on the ground of an alteration in circumstances.

And by sect. 20, no will, or codicil, or any part thereof, is to be revoked otherwise than as aforesaid, or by another will or codicil duly executed, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed; or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking the same.

Revocation is in all cases a question of intention; the Act must be

(a) (1894), P. 191; 63 L. J. 113, P. & D.; 70 L. T. Rep. N. S. 695.

(b) See Theob. Wills, 12, 4th edit.; Hayes & Jarm. Conc. Wills, 482, 11th edit.

(c) *Robinson v. Ommany*, 23 Ch. Div. 285; 49 L. T. Rep. N. S. 19.

(d) *Loffus v. Maw*, 3 Gif. 592; 6 L. T. Rep. N. S. 347.

(e) *Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J. 737, Q. B.

(f) *In bonis Russell*, 15 Pr. Div. 111.

(g) *In bonis Fenwick*, L. R. 1 P. & D. 319.

done *animo revocandi*. Certain Acts of revocation are called dependent relative revocation. For instance, if the mutilation or alteration of a will by the testator is done because he supposes he has duly executed another will or replaced the mutilated parts by other bequests, which in fact he has not done, the will, as it stood before mutilation or alteration, will, on proof of its contents, be admitted to probate, on the above ground.(a)

A subsequent will is not a revocation of a prior will if there be no clause of revocation in the later will, except so far as the subsequent will is inconsistent with the former one.(b) And if a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the prior one is only revoked as to those parts where it is inconsistent, and both the instruments are entitled to probate, although the subsequent instrument is declared to be the last will.(c)

Revocation during insanity is ineffectual. Thus, a testator in a fit of madness destroyed his will by tearing it in pieces, but the pieces were collected and preserved. On his recovery he was informed of the circumstances, and said he must have been mad, and would make a fresh will, but died without doing so. It was held this was no revocation, and the will was established.(d)

As to revocation "by burning, tearing, or otherwise destroying" a will: The tearing or destroying must be such as destroys a material portion of the will, as the signature of the testator, or those of the attesting witnesses.(e) If the destruction is by a third person it must be in the testator's presence and by his direction, with the intention of revoking.(f) However, if done without the testator's authority possibly he might subsequently ratify the act, but if so there must be clear evidence of this fact.(g)

The words "otherwise destroying" are not satisfied by a testator drawing his pen through various parts of his will, and writing on the back of it, "this is revoked;" a will so treated still remains unrevoked.(h) But the cutting out by the testator of his signature amounts to a revocation.(i)

If the mutilation of a particular part of the will is not done with the

(a) *Dancer v. Crabb*, L. R. 3 P. & D. 98; *Beardsley v. Lacey*, 67 L. J. 35, P. & D.; 78 L. T. Rep. N. S. 25.

(b) See *ante*, p. 496.

(c) *Lemage v. Goodban*, L. R. 1 P. & D. 57; *In bonis Griffith*, 2 Id., 457; *In bonis Petchell*, 3 Id., 153; and see *In bonis Hodgkinson*, (1893) P. 339; 62 L. J. 116, P. & D.; 69 L. T. Rep. N. S. 540.

(d) *Brunt v. Brunt*, L. R. 3 Pr. & D. 37.

(e) See *Brown and Powles* Pr. 92.

(f) 1 Viet. c. 26, s. 20.

(g) *Mills v. Milward*, 15 Pr. Div. 20; 59 L. J. 23, P. & D.; 61 L. T. Rep. N. S. 651.

(h) *Cheese v. Lovejoy*, 2 Pr. Div. 251; 46 L. J. 66, P. & D.; 37 L. T. Rep. N. S. 294; *Benson v. Benson*, L. R. 2 Pr. & D. 172.

(i) *Bell v. Fothergill*, L. R. 2 P. & D. 148.

intention of revoking the whole will it may operate as a partial revocation. As where a testatrix cut out the name of one of her executors wherever it occurred in the will, on the ground, as she alleged, that he had a disagreement with his wife, who was the testatrix's daughter, and the court held that this only amounted to a partial revocation.(a)

Where a testator revokes his will, but leaves a testamentary paper in the form of a codicil to a will, such codicil is not revoked by the revocation of the will; as it can only be revoked in one of the modes provided by 1 Vict. c. 26, s. 20.(b) But where a testator having executed a codicil at the foot of his will, cut off his signature to the will, it was held, on proof that he thereby intended to revoke the codicil, that it was revoked also.(c)

A will or codicil shown to have been in the testator's possession up to, but cannot be found at his death, must, in the absence of evidence to the contrary, be presumed to have been destroyed by him *animo revocandi*.(d) But this presumption may be rebutted by evidence leading to the conclusion that the testator did not do this. And declarations, written or oral, made by him before the execution of his will, are admissible as secondary evidence of its contents.(e) It is doubtful, however, if they can be admitted if made after its execution.(f)

The Act further provides that no conveyance or other act made or done subsequently to the execution of a will of real or personal estate comprised therein (except an act of revocation as before mentioned), is to prevent the operation of the will with respect to the interest in such real or personal estate as the testator has power to dispose of by will at the time of his death (sect. 23).

However, if a testator, after disposing of his property, real or personal, by his will subsequently conveys or parts with such property, the will is necessarily revoked.(g) And formerly if the testator had repurchased such property it would not have passed under the will without a republication; now, however, a will speaks from the testator's death, and passes all his property, unless a contrary intention appears thereby (sects. 3, 23, 24); as will be shown more fully hereafter. But if freeholds are specifically devised, and then sold by the testator to a purchaser who the next day reconveys the property to the testator by way of mortgage for securing part of the purchase-money, the sum secured by such mortgage will not pass to the specific devisee.(h) Some further cases on the subject of

(a) *In bonis Leach*, 63 L. T. Rep. N. S. 111.

(b) *In bonis Savage*, L. R. 2 Pr. & D. 78.

(c) *In bonis Bleckley*, 8 Pr. Div. 169.

(d) *Eckersley v. Platt*, L. R. 1 Pr. & D. 281; *Sugden v. Lord St. Leonards*, 1 Pr. Div. 154; 45 L. J. 62, P. & D.

(e) *Sugden v. Lord St. Leonards*, sup.

(f) *Woodward v. Goulstone*, 11 App. Cas. 469; 55 L. T. Rep. N. S. 790; *Atkinson v. Morris*, (1897) P. 41; 75 L. T. Rep. N. S. 440; 66 L. J. 17, P. & D.; *Sugden v. Lord St. Leonards*, sup.

(g) *Moor v. Raisbeck*, 12 Sim. 123, 139.

(h) *Moor v. Raisbeck*, sup.; *Re Clowes*, (1893) 1 Ch. 214; 68 L. T. Rep. N. S. 395; 41 W. R. 69.

constructive conversion of one species of property into another will be found stated *post*.

Revival of Wills.

By 1 Vict. c. 26, s. 22, no will or codicil, or any part thereof which is revoked, can be revived except by the re-execution thereof, or by a codicil duly executed and showing an intention to revive the same. And when a will or codicil has been partly revoked, and afterwards wholly revoked, and is then revived, such revival does not extend to that part which was revoked before the revocation of the whole, unless a contrary intention is shown.

A will or codicil not duly executed may be rendered valid by a later codicil duly executed and referring clearly to the defective will or codicil.(a)

If, however, a testator has a will and codicils, and one of the codicils is defectively executed, and by another codicil duly executed the testator confirms his said will and codicils, this will not confirm the codicil which is defectively executed.(b)

And if a will has been revoked by actual destruction, as if it be burnt, a codicil clearly referring to it cannot revive it as a writing within sect. 9 of 1 Vict. c. 26.(c)

The Testator's Property.

We will now proceed to state what property the testator may dispose of by his will.

What may be Given.—By 1 Vict. c. 26, s. 3, every person may dispose of by his will all real and personal estate to which he is entitled at law or in equity at his death, and which if not so disposed of would devolve upon his heir or his executor or administrator; which extends to copyholds though not surrendered to the use of the testator's will, or although he has not been admitted thereto, or although there is no custom to devise, &c., the same; and also to estates *pur autre vie*, of any tenure whether there be or be not a special occupant thereof, and whether a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests, &c.; and to all rights of entry, &c., to which he is entitled at the time of his death notwithstanding he may become entitled to such estates, &c., subsequently to the execution of his will.

The possibility of reverter on the determination of a fee simple conditional is a right of entry devisable under the above sect. But whether such a possibility is an estate seems doubtful.(d)

(a) *Allen v. Maddock*, 11 Moo. P. C. 427; 31 L. T. Rep. O. S. 359; *In bonis Heathcote*, 6 Pr. Div. 81.

(b) *Croker v. Marquis of Hertford*, 4 Moo. P. C. 339.

(c) *Rogers v. Goodenough*, 5 L. T. Rep. N. S. 719; see also *Newton v. Newton*, *Ib.*, 218.

(d) *Pemberton v. Barnes*, 68 L. J. 192, Ch.; 80 L. T. Rep. N. S. 181; (1899) 1 Ch. 545.

A devisee of copyholds must pay the same stamp duties and fees as would have been payable if the same had been surrendered to the use of the will, and if the testator has not been admitted, the fines and fees which would have been payable on his admission must be paid, and the will, or so much thereof as relates to the copyholds, must be entered on the court rolls of the manor, and the fines and fees due upon the admission of the devisee must be paid. (Sects. 4, 5; see also 57 & 58 Vict. c. 46, s. 85.)

It will be seen that s. 3 of 1 Vict. c. 26, extends the testamentary power to all interests in real and personal property which at the testator's death, if not disposed of, would devolve upon his real or personal representative.

Therefore, property held by the testator in joint tenancy in fee simple cannot be given by his will, as it would not on his death intestate pass to his heir on account of the right of survivorship existing between joint tenants.(a)

However, by the joint operation of sects. 3 and 24 of the Act, making a will speak from the testator's death, if one of the joint tenants before his death has become possessed of the whole estate by survivorship or otherwise, his will devising the estate would be operative to pass it, although made before such event.(b)

And where stock is transferred by the testator into the joint names of himself and his wife, and there is nothing to rebut the presumption of an advancement, he cannot bequeath such property; although if other benefits are by the will given to the wife, she may be put to her election.(c)

Tenants in common and co-parceners may devise their shares, as they have several though undivided interests.(d)

If no disposition by will is made of an estate *pur autre vie* of a freehold nature, it is chargeable in the hands of the heir, coming to him as special occupant, as assets by descent; and if there be no special occupant of an estate *pur autre vie*, whether freehold or copyhold, it goes to the executor or administrator of the party that had the estate thereof by virtue of the grant, and whether it comes to him by reason of special occupancy or by virtue of the Act, it is assets in his hands, to be applied and distributed in the same manner as the personal estate of the testator or intestate (sect. 6).

The heir cannot take as special occupant unless the word "heir" is used in the instrument creating the estate. Therefore, where a life estate was conveyed to A. and B. to hold to them and their heirs upon trusts for C. an infant, it was held that the infant's estate was not an estate to him and his heirs, and that there was no special occupant, and that the estate upon C.'s death passed to his administrator under sect. 6.(e)

(a) Lit. Ten. sect. 287.

(b) Hayes and Jarm Conc. Wills, 92, 11th edit.

(c) *Dummer v. Pitcher*, 2 My. & K. 262; *Coates v. Stevens*, 1 Y. & Coll. 66; and see *ante*, p. 410.

(d) Lit. Ten., sect. 292; Will. R. P. 139, 13th edit.; Jar. Wills, 49, 5th edit.

(e) *Mountcashell (Lord) v. More-Smyth*, (1896) A. C. 158, 165; 65 L. J. 12, P. C.

Another alteration in the law is made by sect. 26 of 1 Vict. c. 26, (a) which enacts that a devise of the land of the testator, or of his land in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, is to be construed to include the customary copyhold and leasehold estates, or any of them to which such description extends, as well as freehold estates, unless a contrary intention appears by the will.

Consequently since the Act, a general devise of *lands* will pass copyholds and leaseholds as well as freeholds, unless a contrary intention appears. However, if on a fair construction of the will there are indications of an intention that leaseholds should not pass by the devise, they will be excluded. (b) Thus, under a devise of "my real estates wherever situate," the testator having both freehold and leasehold estates, it was held that the leaseholds did not pass. (c) But where a testator devised all his real estate in or near a particular place, mentioning it, and he had both freeholds and leaseholds there, it was held that the leaseholds passed. (d) And a devise of "real estate," without any words of locality or description will, it seems, pass leaseholds, if the testator has no freeholds. (e)

Where a person is possessed of the fee simple in certain lands by way of mortgage, and makes a general devise of his lands, this will not, without anything more, pass the beneficial interest in the mortgage debt. (f) But in two cases decided in the Irish Courts it has been held that a specific devise of "all my estate and interest" in the lands on which the mortgage was secured, passed the testator's beneficial interest in the mortgage debt. (g)

As already shown by sect. 30 of the Conveyancing Act, 1881 (which applies to persons dying after 31st December, 1881), freehold trust and mortgage estates pass to the personal representatives of the deceased notwithstanding any testamentary disposition; but that by 57 & 58 Vict. c. 46, s. 88 (replacing 50 & 51 Vict. c. 73), sect. 30 of the Conveyancing Act of 1881 is not to apply to copyholds vested in the tenant on the court rolls on trust or by way of mortgage. (h) In cases prior to the Conveyancing Act, 1881, trust and mortgage estates (including estates held on a constructive trust) would pass under a general devise of all the

(a) For the law prior to this stat., see Theob. Wills, 158, 159, 3rd edit.

(b) *Prescott v. Barker*, 9 Ch. App. 174; 43 L. J. 498, Ch.; 22 W. R. 422.

(c) *Butler v. Butler*, 28 Ch. Div. 66; 54 L. J. 197, Ch.; 52 L. T. Rep. N. S. 90; 33 W. R. 192.

(d) *Moase v. White*, 3 Ch. Div. 763; 24 W. R. 1038.

(e) *Gully v. Davis*, L. R. 10 Eq. 562; 39 L. J. 684, Ch.

(f) *Strode v. Russell*, 2 Vern. 621, 624; *Casborne v. Scarfe*, 1 Atk. 605; 2 L. C. Eq. 6, 9, 7th edit.; *Bowen v. Barlow*, 8 Ch. App. 171; and see *Re Clowes*, (1893) 1 Ch. 214; 68 L. T. Rep. N. S. 395; 41 W. R. 69, C. A.

(g) *Mackesy v. Mackesy*, (1896) 1 Ir. R. 511; *Kilkelly v. Powell*, (1897) 1 Ir. R. 457; and see *Woodhouse v. Meredith*, 1 Mer. 450.

(h) See *ante*, p. 66.

testator's estates, unless a contrary intention could be collected from the will ;(a) as, generally speaking, where the testator by his will charged his real estate with debts or legacies(b) ; or devised it upon trust for sale(c) ; or otherwise by his will made complicated limitations of his realty.(d)

Under Powers.—Another change in the law is made by sect. 27 of 1 Vict. c. 26,(e) which enacts that a general devise of the real estate of the testator, or of his real estate in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, is to be construed to include any real estate, or any real estate to which such description extends, which he may have power to appoint in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention appears by the will. And in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, is to be construed to include any personal estate, or personal estate to which such description extends, which he may have power to appoint in any manner he may think proper, and is to operate as an execution of such power, unless a contrary intention appears by the will.

By the combined effect of sects. 24 and 27, a general gift by will passes property over which the testator has a general power to appoint, although the power was created by an instrument made after the will.(f) But sect. 27 does not enable a testator to execute a power of which he was only the intended donee under the will of a person who survives him.(g)

A power to appoint to any persons by will only is a general power within sect. 27 ;(h) but a general power to appoint usually means by deed or will.

It will be noticed that by sect. 27 it is necessary to show a contrary intention to exclude the exercise of a general power by a general devise or bequest, while under the previous law it was necessary to show an intention to exercise the power.(i)

An appointment by will under a general power to trustees usually makes the appointed property, whether personal or real, part of the testator's general estate, and it will pass as such, and the appointment takes the

(a) *Braybrooke v. Inskip*, 8 Ves. 417 ; *Lysaght v. Edwards*, 2 Ch. Div. 499 ; 45 L. J. 554, Ch. ; 34 L. T. Rep. N. S. 787.

(b) *Hope v. Liddell*, 21 Beav. 193 ; *Re Bellis*, 5 Ch. Div. 504 ; 46 L. J. 353, Ch. ; 25 W. R. 456 ; but see *Re Brown and Sibley*, 3 Ch. Div. 156 ; *Re Stevens' Will*, L. R. 6 Eq. 597.

(c) *Re Smith*, 4 Ch. Div. 70 ; 35 L. T. Rep. N. S. 890 ; 25 W. R. 294.

(d) *Re Packman and Moss*, 1 Ch. Div. 214 ; Theob. Wills, 162, 3rd edit. ; 185, 4th edit.

(e) For the law prior to this sect. see Theob. Wills, 163, 3rd edit. ; 195, 4th edit.

(f) *Boyes v. Cook*, 14 Ch. Div. 53 ; 49 L. J. 350, Ch. ; *Airey v. Bower*, 12 App. Cas. 263 ; 56 L. J. 742, Ch. ; 56 L. T. Rep. N. S. 409 ; 35 W. R. 657.

(g) *Jones v. Southall*, 32 Beav. 31 ; 8 L. T. Rep. N. S. 103 ; 11 W. R. 247.

(h) *Re Powell*, 39 L. J. 188, Ch. ; 18 W. R. 228.

(i) See Hayes & Jarm. Conc. Wills, 60, 11th edit. ; 1 Jarm. Wills, 636, 5th edit. ; *Lake v. Currie*, 2 De G. M. & G. 536 ; *Maddick v. Marks*, 14 Ch. Div. 422 ; 49 L. J. 586, Ch.

property away from those who were to take in default of appointment, when some of the trusts declared by the testator fail by lapse or otherwise. As where the appointment is of property to A. in trust for B., and B. dies before the testator; in which case the property results for the benefit of the testator's real or personal representative, according as to whether the property is real or personal.(a)

However, sect. 27 does not apply to a special power, as a power given to appoint to the children of the appointor or to other particular objects, and a mere general devise or bequest to a child will not operate as an execution of such a power.(b) In the exercise of such a power there must be a reference either to the power or to the property subject to the power; or an intention otherwise shown in the will to exercise the power.(c) And since sect. 27, a general devise of real estate by a testator who has no real estate of his own, does not sufficiently indicate an intention of exercising a special power over real estate, although the objects of such power are included among the devisees.(d)

Generally speaking, however, when the power is a special power, if the words of the will are large enough to include everything belonging to the testator, with the additional words "or over which I have any testamentary power to appoint or dispose of," this will, if the objects of the power are included in the gift, be considered sufficient to show an intention to exercise the power, even though the power is to some extent exceeded; as where it was to pay the debts of the deceased and divide the residue amongst the objects of the power.(e)

As to a reference to the property: where the testator by his will shows that he is disposing of a specific fund, that will generally be considered a sufficient reference to the property. As where A. had power by will to appoint a sum of Three per cent. Consols to his children, and he by his will, without referring to the power, bequeathed to three of his children a third part of the money which he had in the Three per cent. Consols, he having no money in Consols except that over which he had the power, and the bequest was held a good execution of the power.(f) So where A. had

(a) *Re Pinedes*, 12 Ch. Div. 667; 48 L. J. 741, Ch.; *Re Van Hagan*, 16 Ch. Div. 18; *Coxen v. Rowland*, (1894) 1 Ch. 406; 63 L. J. 179, Ch.; 70 L. T. Rep. N. S. 89; 42 W. R. 568.

(b) *Oloves v. Audry*, 12 Beav. 604; *Re Huddleston*, (1894) 3 Ch. 595; 64 L. J. 157, Ch.; 43 W. R. 139.

(c) *Wildbore v. Gregory*, L. R. 12 Eq. 482; *Re Williams*; *Foulks v. Williams*, 42 Ch. Div. 93; 58 L. J. 451, Ch.; 61 L. T. Rep. N. S. 58; *Re Wait*, 30 Ch. Div. 617; 54 L. J. 1172; 53 L. T. Rep. N. S. 336; 33 W. R. 930; *Re Sharland*, (1899) 2 Ch. 536; 68 L. J. 747, Ch.; 81 L. T. Rep. N. S. 384.

(d) *Re Mills*, 34 Ch. Div. 186; 56 L. J. 118, Ch.; 55 L. T. Rep. N. S. 665; 35 W. R. 133; *Re Williams*, *ubi sup.*

(e) *Ferrier v. Jay*, L. R. 10 Eq. 550; 39 L. J. 686, Ch.; 18 W. R. 1130; 23 L. T. Rep. N. S. 302; *Re Swinburn*, 27 Ch. Div. 696; 54 L. J. 229, Ch.; *Von Brockdorff v. Malcolm*, 30 Ch. Div. 172; 55 L. J. 121, Ch.; 53 L. T. Rep. N. S. 263; 33 W. R. 934; *Re Milner*, 68 L. J. 255, Ch.; 80 L. T. Rep. N. S. 151; (1899) 1 Ch. 563.

(f) *Rooke v. Rooke*, 2 Dr. & S. 38; 6 L. T. Rep. N. S. 527; *Re Gratwick*, 35 Beav. 215; L. R. 1 Eq. 177; *Re Wait*, 30 Ch. Div. 617.

power under her father's will to appoint a sum of 4000*l.* to her children, and she bequeathed to a daughter the sum of 4000*l.*, "being the sum left to me by my late father," it was held a sufficient execution of the power.(a)

From what date Will Speaks.—By the combined effect of sects. 3 and 24 of 1 Vict. c. 26, a will now speaks from the testator's death as to real as well as to personal estate. Sect. 3 is set out, *ante*, p. 511; and sect. 24 enacts that every will shall be construed with reference to the real and personal estate comprised therein to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appears therein.

This section relates only to the property comprised in the will, and does not relate to the objects of the gift.(b) Its effect is to abolish the old rule by which, as regards real estate, a will was treated as a conveyance, and operated only on the real estate to which the testator was entitled at the date of his will.(c) But the Act does not say the court is to construe whatever a man says in his will as if it were made the day of his death.(d) Therefore a devise of land, of which I am "now seised," has been held to refer to the date of the will, and if it is an essential part of the description of the property the devise will not pass after-acquired lands.(e) However, a devise of a cottage and land as "now in my occupation," was held to pass a field adjoining afterwards acquired by the testator; these words not being an essential part of the description of the property; and there was here also a codicil made after the field was acquired appointing new trustees and confirming the will.(f) And, generally speaking, gifts by will in the present tense as "of which I am seised or possessed," without expressly referring to the present time, will not prevent after-acquired property from passing.(g)

We have already(h) shown that by 56 & 57 Vict. c. 63, s. 3, sect. 24 of 1 Vict. c. 26, is to apply to the will of a married woman, although she has no separate property at the time of making her will.

In an early case (1844) a devise of "all my Quendon Hall Estates in Essex," was held not to pass small additions to the property acquired after the date of the will. The testatrix had a mansion called Quendon Hall, and land around it, but the

(a) *Cadell v. Wilcocks*, 67 L. J. 9, P.; 78 L. T. Rep. N. S. 83; (1898) P. 21.

(b) *Bullock v. Bennett*, 7 De G. M. & G. 283; 3 W. R. 545; Jarm. Wills, 302, 5th edit.

(c) Theob. Wills, 104, 4th edit.; 7 Byth. & Jar. Conv. 349, 4th edit.

(d) *Re Portal and Lamb*, 30 Ch. Div. 50, 55; 54 L. J. 1013, Ch.; 53 L. T. Rep. N. S. 650; 33 W. R. 859.

(e) *Cole v. Scott*, 1 M. & G. 518; 19 L. J. 63, Ch.; *Cave v. Harris*, 57 L. J. 62, Ch.; 57 L. T. Rep. N. S. 768; 36 W. R. 182.

(f) *Re Champion*, (1893) 1 Ch. 101; 62 L. J. 372, Ch.; 67 L. T. Rep. N. S. 694; and see *Re Edwards*, 63 L. T. Rep. N. S. 481.

(g) *Doe v. Walker*, 12 M. & W. 591; *Langdale (Lady) v. Briggs*, 8 De G. M. & G. 391; 26 L. J. 27 Ch.; Theob. Wills, 106, 4th edit.

(h) *Ante*, p. 500.

term Quendon Hall Estates was not a recognised appellation of any particular property.(a) In a more recent case, however, a devise of the "Cleve Court Estate" was held to pass small properties adjoining it acquired after the date of the will, parol evidence being admitted to show that these properties had been treated by the testator before his death as additions to the Cleve Court Estate.(b)

So on a bequest of leaseholds for years by the description of all that my leasehold messuage at A., and the testator afterwards acquired the reversion in fee simple, the fee simple was held to pass to the person to whom the leaseholds were bequeathed, and not to the residuary devise.(c)

And a bequest of "my new $3\frac{1}{4}$ per cent. annuities" was held to pass all the $3\frac{1}{4}$ per cent. annuities which the testator had at his death. For when a bequest is of that which is generic, of that which may be increased or diminished, something more than the mere expression "my" is required by the Act to show a contrary intention.(d) And before the Act a *general* gift of the testator's personalty passed all the personalty belonging to him at the time of his death.(e)

Description of Property.—The property given by the will should be described with apt words, as loose expressions in this respect have given rise to costly litigation and probably to nullifying the intentions of testators. Thus a devise of "all my estates in or near L., near Maldon," was held not to include a close which was from four to six miles from L., and was in the town of Maldon.(f) Where, however, there is an adequate and sufficient description of what is intended to pass by the will, a subsequent erroneous addition will not vitiate the gift, and may be rejected; the maxim being *falsa demonstratio non nocet*.(g) Therefore, if property be given by a known specific name followed by an erroneous reference to a parish, as "all my interest in the estate known by the name of D. in the parish of K.," the former part of the description being correct and that as to the parish being incorrect, the latter part was rejected.(h)

So where an estate is devised by a known name as in the occupation of a person whose occupancy embraces less than the whole, the reference to occupancy may be rejected.(i)

Certain words and expressions have now acquired a technical meaning. The word "estate" includes both real and personal estate, unless there is

(a) *Webb v. Byng*, 1 K. & J. 580.

(b) *Castle v. Fox*, L. R. 11 Eq. 542; 40 L. J. 302, Ch.

(c) *Miles v. Miles*, L. R. 1 Eq. 462; 35 L. J. 315; *Saxton v. Saxton*, 13 Ch. Div. 359; 49 L. J. 128, Ch.

(d) *Goddard v. Burnett*, 1 K. & J. 341; and see *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; 38 L. J. 528, Ch.

(e) See Jarm. Wills, 289, 290, 5th edit.

(f) *Doe v. Pigott*, 7 Taunt. 553.

(g) 1 Jarm. Wills, 742, 4th edit.; Theob. Wills, 107, 4th edit.; *West v. Lawday*, 11 H. L. Cas. 375; and see *ante*, p. 131.

(h) *Hardwick v. Hardwick*, L. R. 16 Eq. 168.

(i) *Down v. Down*, 7 Taunt. 343; and see *Whitfield v. Langdale*, 1 Ch. Div. 61; *Re Seal*, (1894) 1 Ch. 316; 63 L. J. 275, Ch.

a clear intention in the will to confine the word to personal property.(a) And the fact of the word "estate" occurring among words descriptive of personal property only will not prevent realty from passing.(b)

The words "real estate" do not include leaseholds for years;(c) unless an intention can be gathered from the will that they should pass;(d) or unless perhaps in the case where the testator has no freeholds.(e) An advowson may pass under the words "all other my real estate in the county of L."(f)

Under the word "property," real estate will pass,(g) also personal property,(h) being a word of very extensive meaning when used in a will.(i)

The word "effects" *prima facie* has reference to personal estate, and in some of the older cases this was so even when coupled with the words "devise all the rest and remainder of my effects whatsoever and where-soever and of what nature or kind."(k) But in more recent cases the word "effects" when so coupled has been held to pass real as well as personal estate, on the presumed intention of the testator.(l)

And the word "effects" may pass the whole residuary personalty even when following an enumeration; as where the gift was of "all my furniture, plate, linen, and other effects"; the words "other effects" not being cut down to mean effects *ejusdem generis*.(m) But in some cases the word "effects" following an enumeration has been confined to things *ejusdem generis*, especially if the will contains a residuary gift. As where a testator, after giving certain books, wine, and plate to D., gave "all the rest of the furniture and effects" in his house to D., and bequeathed the rest, residue, and remainder of his estate and effects to T., when it was held that bank notes, and certain securities for money and jewellery found in the house after the testator's death, did not pass to D., but were included in the residuary gift to T.(n)

(a) *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 76.

(b) *Stokes v. Salomons*, 9 Hare, 75; *Hamilton v. Buckmaster*, L. R. 3 Eq. 323; 36 L. J. 85; 15 L. T. Rep. N. S. 177; 15 W. R. 149; but see *Longley v. Longley*, L. R. 13 Eq. 133; 41 L. J. 168, Ch.

(c) *Butler v. Butler*, 28 Ch. Div. 66; 54 L. J. 197, Ch.; 52 L. T. Rep. N. S. 90; 33 W. R. 192.

(d) *Moase v. White*, 3 Ch. Div. 763; 24 W. R. 1038.

(e) *Gully v. Davis*, L. R. 10 Eq. 562; 39 L. J. 684, Ch.

(f) *Re Hodgson*, 67 L. J. 591, Ch.; (1898) 2 Ch. 545; 79 L. T. Rep. N. S. 345.

(g) *Morrison v. Hoppe*, 4 De G. & S. 234; *Lloyd v. Lloyd*, L. R. 7 Eq. 458; 38 L. J. 458, Ch.; 20 L. T. Rep. N. S. 898; 17 W. R. 702.

(h) *Tyrone v. Waterford*, 29 L. J. 486, Ch.; 8 W. R. 454.

(i) *Jones v. Skinner*, 5 L. J. 87, Ch.

(k) *Camfield v. Gilbert*, 3 East. 516.

(l) *Smyth v. Smyth*, 8 Ch. Div. 561; 38 L. T. Rep. N. S. 633; 26 W. R. 736; *Hall v. Hall*, (1892) 1 Ch. 361; 61 L. J. 289, Ch.; 66 L. T. Rep. N. S. 206; 40 W. R. 277.

(m) *Hodgson v. Jex*, 2 Ch. Div. 122; *Re Jupp*, (1891) P. 300; 60 L. J. 92, Pr. & D.; 65 L. T. Rep. N. S. 166; 40 W. R. 176.

(n) *Re Miller*; *Daniell v. Daniell*, 61 L. T. Rep. N. S. 365; and see *Northey v. Paxton*, 60 L. T. Rep. N. S. 30.

And a gift of "all my goods and chattels" in a particular house will not pass *choses in action* as bonds or other securities for money.(a)

A bequest of household furniture includes such things as contribute to the use or convenience of the householder, or ornament of the house; as pictures, linen, china.(b) But not wine, or books,(c) or tenant's fixtures.(d)

A bequest of or an exception from a bequest of plate does not include plated articles; as plate means articles of solid silver.(e)

The word "money" by itself in a will means money strictly, and nothing else, but when used in connection with other words it may have a much more extended signification.(f) A bequest of "all my moneys" includes cash in the house and money at a bank on a current or on a deposit account;(g) and bank notes.(h)

But the word "money" will not pass the apportioned part of an annuity or of interest payable to the testator which had accrued from the last day of payment; nor a legacy which had not been acknowledged to be at his disposal;(i) nor stock in the public funds,(k) unless it appears to have been the testator's intention that the stock should pass;(l) for then the word money may pass not only stock but the testator's whole residuary estate; as where after making specific bequests a testator left "the residue of the money, if any," to A.(m) So a bequest "of money which may remain after payment of debts," has been held to include the testator's personal estate not specifically bequeathed.(n)

However, if there is an express gift of the residue, a gift of all moneys will be construed in its strict sense.(o)

A bequest of "ready money" includes not only cash in the house, but

(a) *Chapman v. Hart*, 1 Ves. 271; *Hertford v. Lowther*, 7 Beav. 1; 13 L. J. 41, Ch.; but see *Popham v. Lady Aylesbury*, Amb. 68.

(b) *Kelly v. Powlett*, Amb. 605.

(c) *Kelly v. Powlett*, sup.; *Bridgman v. Dove*, 3 Atk. 202; and see *Manton v. Tabois*, 30 Ch. Div. 92; 54 L. J. 1008, Ch.; 53 L. T. Rep. N. S. 289; 33 W. R. 832.

(d) *Finney v. Grice*, 10 Ch. Div. 13; 48 L. J. 247, Ch.; 27 W. R. 147.

(e) *Holden v. Ramsbottom*, 4 Giff. 205; 7 L. T. Rep. N. S. 735; 11 W. R. 302.

(f) *Glendening v. Glendening*, 9 Beav. 324; *Re Cadogan*, 25 Ch. Div. 154; 49 L. T. Rep. N. S. 666; 32 W. R. 57.

(g) *Manning v. Purcell*, 7 De G. M. & G. 55; 24 L. J. 522, Ch., *Byrom v. Brandreth*, L. R. 16 Eq. 475; 42 L. J. 824, Ch.; 21 W. R. 942.

(h) 1 Jarm. Wills, 724, n. 5th edit.; Theob. Wills, 158, 4th edit.

(i) *Byrom v. Brandreth*, sup.

(k) *Collins v. Collins*, L. R. 12 Eq. 455; 40 L. J. 541, Ch.; 19 W. R. 971; *Re Sutton*, 28 Ch. Div. 464.

(l) *Re Cadogan*, sup.

(m) *Montagu v. Sandwich*, 33 Beav. 324; 9 L. T. Rep. N. S. 632; 12 W. R. 236; *Dowson v. Gascoin*, 2 Keen 14; 6 L. J. 295, Ch.; *Re Pringle*, 17 Ch. Div. 819; see also *Prichard v. Prichard*, L. R. 11 Eq. 232; 40 L. J. 92, Ch.

(n) *Rogers v. Thomas*, 2 Keen 8; *Stocks v. Barre*, Johns. 54; *Re Egan*; *Mills v. Penton*, 80 L. T. Rep. N. S. 153; 68 L. J. 307, Ch.; (1899) 1 Ch. 688.

(o) *Willis v. Plaskett*, 4 Beav. 208; *Williams v. Williams*, 8 Ch. Div. 789.

cash at the testator's bankers on a current account;(a) or at a bank on deposit account which can be withdrawn without previous notice;(b) or in a savings bank, if notice of payment has been given by the testator; but not money owing to him on notes of hand;(c) nor rent, or interest due on a mortgage.(d)

"Securities for money" will pass stock in the public funds;(e) a vendor's lien for unpaid purchase money;(f) money lent on mortgage, the right to receive which is in the testator;(g) railway debenture stock; and promissory notes.(h)

But it does not include bank stock, as that is nothing but a *share* in the capital stock of an incorporated banking company;(i) nor the certificate of shares in a trust company;(k) nor a mere I.O.U.;(l) nor a banker's receipt for money due on deposit.(m)

A bequest of "shares in a railway company," will pass the testator's stock in that company.(n) But a bequest of "shares" in a public company will not pass the debenture stock of the company if the testator has at the date of his will both shares and debenture stock in the company;(o) however, if he has, at the date of his will and at the time of his death, only debenture stock in the company, that will pass under the bequest of shares in the company.(p)

A bequest of foreign bonds will not include Colonial bonds.(q)

On a gift of a farm to A., and of "farming stock" to B., it seems the growing crops will pass to B., although there is no gift of the general personal estate to B.(r)

The word "farm" includes the farmhouse and the lands and tenements held therewith, whatever the tenure may be.(s)

The word "living" is in some cases sufficient to pass an advowson;

(a) *Parker v. Marchant*, 1 Ph. 356; 12 L. J. 314, Ch.

(b) *Mayne v. Mayne*, (1897) 1 Ir. R. 324.

(c) *Re Powell*, John. 49.

(d) *Fryere v. Ranken*, 11 Sim. 55; 9 L. J. 337, Ch.

(e) *Bescoby v. Pack*, 1 Sim. & S. 500; *Re Beavan*, 53 L. T. Rep. N. S. 245.

(f) *Callow v. Callow*, 42 Ch. Div. 550.

(g) *Ogle v. Knipe*, L. R. 8 Eq. 434; 38 L. J. 692, Ch.; 20 L. T. Rep. N. S. 867.

(h) *Re Beavan*, sup.

(i) *Ogle v. Knipe*, sup.

(k) *Re Maitland*, 74 L. T. Rep. N. S. 274.

(l) *Barry v. Harding*, 1 J. & Lat. 475.

(m) *Hopkins v. Abbott*, L. R. 19 Eq. 222; 44 L. J. 316, Ch.; 31 L. T. Rep. N. S. 820; 23 W. R. 227.

(n) *Morrice v. Aylmer*, L. R. 7 H. L. Cas. 717.

(o) *Re Bodman*, (1891) 3 Ch. 135; 61 L. J. 31, Ch.; 65 L. T. Rep. N. S. 522; 40 W. R. 60.

(p) *Re Weeding*, (1896) 2 Ch. 365; 65 L. J. 743, Ch.; 74 L. T. Rep. N. S. 651; 44 W. R. 556.

(q) *Hull v. Hill*, 4 Ch. Div. 97; 25 W. R. 223.

(r) *Re Roose*, 17 Ch. Div. 696; 50 L. J. 197, Ch.; 43 L. T. Rep. N. S. 719; 29 W. R. 230, disapproving of *Vaisey v. Reynolds*, 5 Rus. 12.

(s) 1 Jarm. Wills, 740, 5th edit.; *Holmes v. Milward*, 47 L. J. 522, Ch.; 38 L. T. Rep. N. S. 381; 26 W. R. 608.

the context, however, must determine whether the advowson or only the next presentation is meant.(a) The word "transfer" in the Benefices Act, 1898 (*ante*, p. 76), does not include a transmission on death (sect. 1, sub-sect. 6).

"Message" will pass the orchard garden and curtilage.(b)

A devise of the "profits" or "income" of land passes the land itself, and since 1 Vict. c. 26, the fee simple thereof;(c) unless there are in the will sufficient words to cut down the gift to a life interest only.(d)

A gift of the "use and occupation" of a house does not enjoin personal occupation, but the donee may let the house;(e) unless there be a gift over on the donee's ceasing to occupy.(f)

A devise of "ground rents" by a person seized in fee(g) or entitled for years of the reversion, will pass that reversion.(h)

Residuary gifts.—A devise of lands, even by way of residuary devise, is still specific, notwithstanding sect. 24 of 1 Vict. c. 26 (*ante*, p. 516), which makes a will speak from the testator's death; because the testator knows practically upon what real estate the gift will operate, as well since as before the Act. It is different, as to a gift of the residue of personal estate, for here the testator knows that it will be uncertain until his death, and even then the expression necessarily imports what will remain after payment of funeral expenses, debts, and other charges.(i)

By 1 Vict. c. 26, s. 25, however, unless a contrary intention appears by the will, real estate or any interest therein comprised in any devise which shall fail or be void by reason of the death of the devisee in the testator's lifetime, or from being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise.

Prior to this section lapsed and void devises went to the heir and not to the residuary devisee.(k)

The section is to be construed on the principle of assimilating a residuary devise of realty with a similar bequest of personalty.(l)

In order that the section may apply, however, there must be a universal residuary devise, for if the gift is of a particular portion only of the testator's property, the section does not apply. Therefore where a testator gave certain lands in the parish of H. to A., and devised to B. "the rest of his hereditaments in the parish of H.," and the devise to A. was void as being given to him on a secret trust for a charity, it was held that the

(a) *Webb v. Byng*, 2 K. & J. 669.

(b) Co. Lit. 5 b. ; *et ante*, p. 131.

(c) *Mannox v. Greener*, L. R. 14 Eq. 456 ; 27 L. T. Rep. N. S. 408.

(d) *Coward v. Larkman*, 60 L. T. Rep. N. S. 1, H. L.

(e) *Rabbeth v. Squire*, 4 De G. & J. 406 ; *Mannox v. Greener*, *sup.*

(f) *Maclaren v. Stainton*, 27 L. J. 442, Ch.

(g) *Maundy v. Maundy*, 2 Str. 1020.

(h) *Kaye v. Laxon*, 1 B. C. C. 76.

(i) *Hensman v. Fryer*, 3 Ch. App. 420 ; 37 L. J. 97, Ch. ; 17 L. T. Rep. N. S. 394 ; *Lancefield v. Iggulden*, 10 Ch. App. 136, 141 ; 44 L. J. 203, Ch. ; 31 L. T. Rep. N. S. 813 ; 23 W. R. 223.

(k) *Jarm. Wills*, 609, 5th edit. ; 2 Prid. Conv. 514, 17th edit.

(l) *Carter v. Haswell*, 26 L. J. 576, Ch. ; 5 W. R. 388.

lands comprised in that devise did not pass to B., but were undisposed of.(a)

However, a gift of "other real estate,"(b) or of all real estate not hereinbefore devised, following specific devises, amounts to a residuary devise.(c) For where the will contains a general residuary gift, it passes everything not disposed of, whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or otherwise. And the intention to exclude such property must be plain and unequivocal.(d) A recital in a will that the testator had settled certain property in a particular manner, which, in fact, was not so settled, but at the testator's disposal, was held not to prevent the property passing under the general residuary gift.(e)

As to residuary bequests, no particular words are necessary to pass the residuary personalty ;(f) the words "all my other effects" have been held sufficient.(g) So a bequest of "my furniture, plate, books, live stock, or what else I may be possessed of at my decease" was held to pass the residuary personalty.(h)

And when a testator gives his property generally by such words as "all my property" or "all I have power over," and then proceeds to enumerate particulars as plate, linen, pictures, lace, such enumeration will not cut down the effect of the general words; but the whole personal estate will pass,(i) unless it appears from the will that the gift was to be confined to the articles enumerated.(k)

And the words "goods" or "chattels" may be sufficient to pass the whole personal estate; but much depends upon the context of the will.(l) And these words, if followed by an enumeration of particulars, may be confined to things *ejusdem generis*(m) or not, according to what appears to have been the testator's meaning as gathered from his will.(n) As to the effect of a bequest of goods in a particular place, see *ante*, p. 519.

Residue of personal estate means the personal estate which remains

(a) *Springett v. Jennings*, 6 Ch. App. 338; 40 L. J. 348, Ch.; 24 L. T. Rep. N. S. 643; 19 W. R. 575; see also *Re Brown*, 1 K. & J. 522.

(b) *Cogswell v. Armstrong*, 2 K. & J. 227.

(c) *Green v. Dunn*, 20 Beav. 6; 24 L. J. 577, Ch.

(d) *Bernard v. Minshull*, John. 276; *Re Baggot*, (1893) 3 Ch. 348; 62 L. J. 1006, Ch.; 69 L. T. Rep. N. S. 399, C. A.

(e) *Re Baggot*, *sup.*

(f) *Bland v. Lamb*, 2 Jac. & W. 399.

(g) *Hearne v. Wigginton*, 6 Mad. 119.

(h) *Fleming v. Burrows*, 1 Rus. 276; 4 L. J. 115, Ch.; and see other cases, *ante*, p. 518.

(i) *King v. George*, 4 Ch. Div. 435; 25 W. R. 266; 5 Ch. Div. 627, C. A.; *Dean v. Gibson*, L. R. 3 Eq. 713; 36 L. J. 657, Ch.; 15 W. R. 809.

(k) *Rawlings v. Jennings*, 13 Ves. 39; *Enohin v. Wylie*, 8 H. L. Cas. 1; 6 L. T. Rep. N. S. 263; 31 L. J. 402, Ch.; 10 W. R. 467.

(l) *Kendall v. Kendall*, 4 Rus. 360; 6 L. J. 111, Ch.; *King v. George*, *sup.*; *Jarm. Wills*, 706, 5th edit.

(m) *Rawlings v. Jennings*, *sup.*; *Newman v. Newman*, 26 Beav. 220; *Hayes & Jar. Conc. Wills*, 153, 11th edit.

(n) *Parker v. Marchant*, 1 Y. & C. C. C. 290; 1 Ph. 356; 12 L. J. 314, Ch.; *Fisher v. Hepburn*, 14 Beav. 626.

after payment of the testator's debts, funeral and testamentary expenses, and the costs of the administration of his estate.(a)

Doctrine of Conversion.

The equitable doctrine of the conversion of land into money or money into land may materially affect the dispositions in a will. For money agreed or directed to be laid out in land is treated as real estate in equity; and land contracted or devised to be sold is treated as money; and each species of property devolves in the character which the instrument has impressed upon it; for equity looks upon that as done which ought to be done.(b) We have already(c) spoken of the effects of a binding contract to buy or sell land. And when a person contracts with a builder to erect a house on freehold land belonging to him and dies before completion, his heir or devisee is, it seems, entitled to have the house finished at the expense of the personal estate of the testator or intestate.(d)

However, a trust for sale cannot in equity convert real estate into personal estate, unless it is absolute and effective.(e) And what in form is a trust for sale may amount to a discretionary power of sale.(f) So money directed to be laid out in land is only considered as land where the direction is imperative.(g) Where the direction to convert is imperative, the fact that the trustees have a discretion as to the time does not affect the direction.(h)

Time of Conversion.—Where an absolute direction to convert is given by will, the conversion takes effect from the death of the testator, if no other period is fixed by the will.(i) But where the trustees have a discretion to convert or not, the property remains in its original state until they exercise their discretion.(k)

Election.—And the person absolutely entitled to the property which is directed to be converted, may, before its actual conversion, elect to take it in its original as distinguished from its destined state, provided such person is competent to elect.(l)

(a) *Trethewy v. Helyar*, 4 Ch. Div. 53; 46 L. J. 125, Ch.

(b) See Story's Eq. sect. 64 g.; *Fletcher v. Ashburner*, 1 Br. C. C. 497; 1 L. C. Eq. 827, 834, *et seq.*, 7th edit.

(c) *Ante*, p. 65.

(d) *Cooper v. Jarman*, L. R. 3 Eq. 98; 36 L. J. 85, Ch.; *Day v. Sprake*, 67 L. J. 619, Ch.; (1898) 2 Ch. 510.

(e) *Goodier v. Edmunds*, (1893) 3 Ch. 455; 62 L. J. 649, Ch.

(f) *Re Hotchkys*, 32 Ch. Div. 408; 55 L. J. 546; 55 L. T. Rep. N. S. 110; 34 W. R. 569, C. A.

(g) *Walker v. Denne*, 2 Ves. Jur. 170, 184.

(h) *Re Raw*, 26 Ch. Div. 601; 53 L. J. 1050; 51 L. T. Rep. N. S. 282; 32 W. R. 986.

(i) *Re Raw*, *sup.*; *Hutchin v. Mannington*, 1 Ves. Jur. 367.

(k) *Polley v. Seymour*, 2 Y. & C. Ex. 708; 7 L. J. 12, Ex.

(l) *Benson v. Benson*, 1 P. W. 130; *Meek v. Devenish*, 6 Ch. Div. 566; 25 W. R. 688; 36 L. T. Rep. N. S. 911; 47 L. J. 57, Ch.

An infant cannot elect, except under the direction of the court ;(a) nor a lunatic.(b) A married woman may, however, elect, if of full age, unless she is restrained from alienation.(c)

As to what acts amount to an election, although they should be clear and unequivocal, it has been held that where land was directed to be sold, such acts as entry thereon and demising it by the person entitled to elect amounted to an election to take it as land and to a reconversion.(d) So if such person devises the land in specie by his will, it amounts to an election and reconversion.(e) So where money is directed to be laid out in land, investing the money by the party absolutely entitled on mortgage and in the funds is evidence of an intention to take the money as personalty.(f) An election should not be made by a parol declaration only, as there are conflicting decisions as to its effect.(g) Where lands are directed to be converted, and several persons have a right to elect, one cannot, as a rule, elect to take the land in its original state without the consent of the rest.(h) But if money is directed to be laid out in land for the benefit of several persons as tenants in common in fee, one may elect to take his share without the consent of the others ; for if the land were bought it might be at once resold.(i)

Disposition of Interests undisposed of.—Where real estate is directed to be sold, and the testator expressly declares that the money arising therefrom shall be considered as part of the residuary personalty, it will pass under the general residuary bequest of personalty in the will.(k)

But unless an intention is expressed in or can be gathered from the whole will, that the proceeds of the sale of real estate undisposed of are to form part of the testator's personal estate, they will not pass to the residuary legatee. Therefore where a testator devised realty to trustees upon trust to sell, and from the proceeds thereof to pay legacies, it was held that the surplus proceeds did not go to the residuary legatee, but resulted to the testator's heir at law ; for in this case the sale was directed only for a particular purpose.(l)

The cases in which a contest may arise between a residuary devisee and the testator's heir are now not likely to be numerous, as by sect. 25 of

(a) *Carr v. Ellison*, 2 Bro. C. C. 56 ; *Robinson v. Robinson*, 19 Beav. 494.

(b) *Ashby v. Palmer*, 1 Mer. 296.

(c) See *ante*, p. 470 ; *Re Davidson*, 11 Ch. Div. 341 ; 40 L. T. Rep. N. S. 726.

(d) *Crabtree v. Bramble*, 3 Atk. 680 ; *Re Davidson*, *sup.*

(e) *Meek v. Devenish*, *sup.*

(f) *Harcourt v. Seymour*, 2 Sim. N. S. 12 ; 20 L. J. 606, Ch.

(g) See *Jarm. Wills*, 563, 5th edit.

(h) *Holloway v. Radcliffe*, 23 Beav. 163 ; *Re Davidson*, 11 Ch. Div. 341 ; 40 L. T. Rep. N. S. 726.

(i) *Seely v. Jago*, 1 P. W. 389.

(k) *Kidney v. Coussmaker*, 1 Ves. Jur. 436 ; and see *Court v. Buckland*, 1 Ch. Div. 605, 610 ; 45 L. J. 214, Ch. ; *Singleton v. Tomlinson*, 3 App. Cas. 404 ; 38 L. T. Rep. N. S. 653 ; 26 W. R. 722.

(l) *Maugham v. Mason*, 1 Ves. & B. 410 ; see also *Ackroyd v. Smithson*, 1 L. C. Eq. 384, 7th edit. ; *Theob. Wills*, 212, 4th edit. ; *Court v. Buckland*, *sup.*

1 Vict. c. 26, unless a contrary intention appears by the will, devises of real estate or any interest therein, which fail or are incapable of taking effect, fall into the residuary devise, if any, contained in the will, as already fully shown.(a)

Where a conversion is directed, and the trusts thereof do not exhaust the whole beneficial interest, and that interest is not by the will given to others, it then becomes a question upon whom it devolves. In such an event the conversion does not go beyond the dispositions made by the testator. Thus, in the leading case of *Ackroyd v. Smithson*,(b) a testator gave certain legacies, and directed his real and personal estate to be sold, and, after his debts and the legacies had been paid out of the proceeds, gave the residue to certain persons in certain proportions, two of whom died in his lifetime and their shares lapsed. And it was held that so far as such shares were constituted of personal estate they went to the testator's next of kin, and so far as they were constituted of real estate they went to his heir at law.

And where realty is directed to be sold, a mere declaration that the proceeds thereof shall be deemed personal estate will not deprive the heir of his right to the part undisposed of by the will ;(c) nor will a declaration that the heir shall not take in case of lapse do so.(d)

So where money is by a will directed to be laid out in land and the disposition of part thereof fails, it belongs to the testator's next of kin.(e)

How the Heir and Next of Kin Take.—Where land is directed to be sold, and there is a *total* failure of the objects for which the conversion was directed, the heir takes the property as realty, for when the objects fail the intention to convert fails also (f) But if there is only a partial failure of the objects for which the conversion is to be made, as when one of several tenants in common dies in the testator's lifetime, then his share results to the testator's heir as personalty, and if he be dead, goes to his personal representative.(g)

So personalty bequeathed to be laid out in land upon trusts which fail, the land purchased before such failure goes to the next of kin as real estate.(h)

Conversion by extraneous Acts.—A contract binding on both parties for the sale of a testator's real estate, though not completed at his death, operates as a conversion of such real estate into personalty.(i) If the testator's title, however, turns out to be bad, and the trustees or executors

(a) *Ante*, p. 521.

(b) 1 Bros. C. C. 503 ; 1 L. C. Eq. 372, 7th edit.

(c) *Taylor v. Taylor*, 3 De G. M. & G. 190 ; 22 L. J. 742, Ch., overruling *Phillips v. Phillips*, 1 Myl. & K. 649.

(d) *Fitch v. Weber*, 6 Hare 145 ; 17 L. J. 361, Ch.

(e) *Cogan v. Stevens*, 5 L. J. 17, Ch. ; *Bective v. Hodson*, 10 H. L. Cas. 656 ; *et post*.

(f) *Davenport v. Coltman*, 12 Sim. 610 ; *Smith v. Claxton*, 4 Madd. 484.

(g) *Smith v. Claxton*, *sup.* ; *Wright v. Wright*, 16 Ves. 188 ; *Re Richerson*, (1892) 1 Ch. 379 ; 61 L. J. 202, Ch. ; 66 L. T. Rep. N. S. 174 ; 40 W. R. 233.

(h) *Curteis v. Wormald*, 10 Ch. Div. 173 ; 27 W. R. 419 ; 40 L. T. Rep. N. S. 108.

(i) See *ante*, p. 65.

of his will thereupon rescind the contract, then the contract being put an end to, does not cause an equitable conversion of the realty into personalty.(a)

So a conversion may take place by force of a notice to treat under the Lands Clauses Consolidation Acts followed by an agreement as to the price to be paid ; but not by a mere notice to treat, as already(b) fully shown.

And a conversion may arise under an option to purchase real estate at a future time. Thus, where land is leased with an agreement that the lessee may within a limited time purchase the inheritance of the land leased, and the land is subsequently devised generally, and the option to purchase is exercised within the limited time, but after the testator's death, the land is converted as from the time when the option is exercised, and the purchase money falls in the residuary personalty.(c) The same result follows though the option to purchase is given after the will is made devising the estate.(d)

The rule in *Lawes v. Bennett*(e) also applies where the owner of the estate giving the option to purchase dies intestate, and though the option is not to be exercised until after his death.(f)

However, it has been held that where the will is made, or republished, *after* the date of the contract giving the option to purchase, and the testator *specifically* devises the property, and after his death the option is exercised, the devisee is entitled to the purchase money as the specific mention of the property shows an intention on the testator's part to pass what beneficial interest remained.(g) It has been said, however, that *Emuss v. Smith*(h) was only a case decided on the construction of the testator's intention.(i)

The Objects of the Testator's Bounty.

The objects of a testator's bounty should be so described and identified by his will as to preclude any question arising on the will as to who was intended to take the gift. But first we will state who may be devisees and legatees. Certain disabilities and objections attach to some objects of a testator's bounty or intended bounty.

Corporations.—By 34 Hen. 8, c. 5, corporations were excluded from taking lands by devise ; and though 1 Vict. c. 26 repeals the above statute, it does not in terms authorise devises to corporations ; but it would seem that corporations, with power to hold lands,(k) might take by devise, except so far as objections might arise on the ground of perpetuity.(l)

(a) *Re Thomas*, 34 Ch. Div. 166 ; 56 L. J. 9 Ch. ; 55 L. T. Rep. N. S. 629.

(b) See *ante*, p. 64.

(c) *Lawes v. Bennett*, 1 Cox 167 ; *Townley v. Bedwell*, 14 Ves. 591 ; *Collingwood v. Row*, 26 L. J. 649, Ch.

(d) *Weeding v. Weeding*, 1 John. & H. 424.

(e) *Supra*.

(f) *Re Isaacs*, (1894) 3 Ch. 506 ; 63 L. J. 815, Ch. ; 71 L. T. Rep. N. S. 386 ; 42 W. R. 685.

(g) *Drant v. Vause*, 1 Y. & Col. C. C. 580 ; 11 L. J. 170, Ch. ; *Emuss v. Smith*, 2 De G. and Sm. 722.

(h) *Supra*.

(i) Per Chitty J. on *Re Isaacs*, *sup*.

(k) See *ante*, p. 4.

(l) See Theob. Wills, 98, 4th edit.

However, although a trade union, registered under the Trade Union Acts, may, by virtue of sect. 7 of the Act of 1871, "purchase or take upon lease" land of one acre in extent, it was held that it could not take land by devise; as the word "purchase" in the Act meant acquiring by payment of money.(a)

Charitable Uses.—We have already had occasion to refer to the statutes which now regulate the law as to gifts to charitable uses.(b) In order to determine what are charitable purposes reference is usually had to the preamble to the Stat. 43 Eliz. c. 4, which, although one of the statutes repealed by the Mortmain and Charitable Uses Act, 1888,(c) is set out in that statute (sect. 13); and amongst the objects mentioned are the relief of aged and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, &c.; repair of bridges, ports, churches, sea banks, highways, relief or redemption of captives, &c.

Charity is not, however, confined to the objects enumerated in the above preamble, but extends to all objects which are of a general public, or local, use and benefit;(d) as to the Royal Society, which is one for improving natural knowledge, or to the Royal Geographical Society, which is one for the improvement and diffusion of geographical knowledge;(e) or to the British Museum.(f)

As to gifts for religious purposes, a bequest for the poor and the service of God is a valid charitable gift.(g)

And a bequest to repair the fabric or ornaments of a church is for the public benefit, and therefore valid; but a gift for the repair of a vault outside the church is bad if it offends the rule against perpetuities,(h) already(i) considered. Still a bequest to a charitable society with a condition annexed that the society shall keep the testator's family vault in repair, with a gift over to another charitable society in default of doing so, is a valid condition, as the rule against perpetuities has no application to the gift over to another charity.(k)

A bequest for the benefit of any of the institutions for ministers and members of Protestant Dissenters is good.(l)

(a) *Re Amos*, (1891) 3 Ch. 159; 63 L. J. 570, Ch.; 65 L. T. Rep. N. S. 69; 39 W. R. 550.

(b) *Ante*, p. 2, *et seq.*

(c) 51 & 52 Vict. c. 42, s. 13, set out *ante*, p. 3.

(d) *Jarm. Wills*, 166, 5th edit.; *Theob. Wills*, 295, 4th edit.

(e) *Beaumont v. Oliveira*, 4 Ch. App. 309; 38 L. J. 239, Ch.; 20 L. T. Rep. N. S. 53; 17 W. R. 269.

(f) *British Museum v. White*, 2 Sim. & St. 594.

(g) *Farquar v. Darling*, (1896) 1 Ch. 50; 65 L. J. 62, Ch.; 73 L. T. Rep. N. S. 382.

(h) *Hoare v. Osborne*, L. R. 1 Eq. 585; 14 L. T. Rep. N. S. 935; L. J. 345, Ch.; 14 W. R. 383; *Rickard v. Robson*, 31 L. J. 897, Ch.; 7 L. T. Rep. N. S. 87.

(i) *Ante*, p. 423.

(k) *Re Tyler*, (1891) 3 Ch. 252; 60 L. J. 686, Ch.; 65 L. T. Rep. N. S. 367; 40 W. R. 7.

(l) *Shrewsbury v. Hornby*, 5 Hare 406; *Attorney-General v. Lawes*, 8 Hare 32; 19 L. J. 300, Ch.; *Re Delmar's Charitable Trust*, (1897) 2 Ch. 163; 76 L. T. Rep. N. S. 594; 45 W. R. 680.

And since 2 & 3 Will. 4, c. 115 (subjecting Roman Catholics to the same laws as to schools and places of worship as Protestant Dissenters), bequests for the promotion of the Roman Catholic religion are valid.(a)

So since 9 & 10 Vict. c. 59, s. 2 (subjecting Jews to the same laws as to schools and places of worship as Protestant Dissenters), a bequest to enable persons professing the Jewish religion to learn and to say its prayers is valid.(b)

Superstitious Uses.—The statutes removing religious disabilities have not affected bequests to superstitious uses. Therefore, a bequest to priests to offer up masses for the souls of the dead is void, notwithstanding 2 & 3 Will. 4, c. 115, and 23 & 24 Vict. c. 134.(c)

What Property may be given to Charity.—It has already been shown(d) that prior to the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), land, or anything savouring of realty, could not with certain exceptions be given by will to charitable uses; such gifts must have been made according to the formalities prescribed by 9 Geo. 2, c. 36, up to the 13th August, 1888, and after that time by those prescribed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42) already(e) detailed.

By the Mortmain and Charitable Uses Act, 1891, however, land may be assured by will for any charitable use, but (save as by the Act provided) such land must be *sold* within one year from the testator's death, &c., as fully stated, *ante*, p. 5, where the other sections of the Act, and decisions thereon will be found also set out.

The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42) which repeals (sect. 13), and re-enacts, with amendments, 9 Geo. 2, c. 36, and other Acts relating to Mortmain and Charitable Uses, as already shown, expressly provides that such repeal is not to affect the past operation of, or any rights or obligations arising under, the repealed Acts. A few instances of cases arising and decided under 9 Geo. 2, c. 36, may therefore still be of use.

Money directed to arise from the sale of land was within the statute 9 Geo. 2, c. 36, and could not be given by will to charitable uses.(f) Nor could the purchase money payable for land contracted to be sold by the testator, and for which he had a lien on the estate sold;(g) nor leaseholds for years;(h) nor money invested on mortgage of real estate.(i)

As to shares in companies holding land as railway companies, or dock

(a) *West v. Shuttleworth*, 2 Myl. & K. 684; 4 L. J. 115, Ch.

(b) *Re Michel*, 28 Beav. 39; 2 L. T. Rep. N. S. 46.

(c) *West v. Shuttleworth*, *supra*; *Re Blundell*, 30 Beav. 360; 5 L. T. Rep. N. S. 337; 10 W. R. 34.

(d) *Ante*, p. 2.

(e) See *ante*, p. 3.

(f) *Curtis v. Hutton*, 14 Ves. 537.

(g) *Harrison v. Harrison*, 1 Rus. & M. 71.

(h) *Paice v. Archbishop of Canterbury*, 14 Ves. 364.

(i) *Attorney-General v. Meyrick*, 2 Ves. 44; *Re Watts*; *Cornfield v. Elliott*, 27 Ch. Div. 818; 29 Id. 947; 55 L. J. 382, Ch.; 33 W. R. 885.

companies, the question whether such shares could be bequeathed to a charity depended upon whether the land was held by the company as merely auxiliary to a trading purpose or not; for if the shareholder could only call for a share of the profits, and not for a part of the land, such shares might be bequeathed to a charity.(a) So the debentures or debenture stock of railway, dock, or water companies might be bequeathed to a charity where the holders thereof had no power to take the land of the company.(b) So similar interests were held not to be within the Mortmain and Charitable Uses Act, 1888.(c)

But if such bonds or debentures give to the holders a specific charge on the tolls or dues which arise from the land of the company, the bonds or debentures are within the object of the Act, and could not be given to charitable uses.(d)

However, it must be remembered that by sect. 3 of the Mortmain and Charitable Uses Act, 1891, land no longer includes money secured on land or other personal estate arising from or connected with land.

It had also been long held that where a testator declared that if any person would within a specified time at his own expenses give land as a site and dedicate it to charity, he, the testator, bequeathed a legacy to erect thereon almshouses or a hospital, was a valid bequest.(e)

And certain gifts for religious purposes were authorised by 43 Geo. 3, c. 108, s. 1, as to which see *ante*, p. 4. Other statutory exceptions will also be found stated, *ante*, p. 4.

Secret Trusts for Charities.—The statute law cannot be evaded by a secret trust for charity, and a devisee may be compelled to disclose any promise which he may have made to the testator to devote the land to charity. And if the promise be denied, it may be proved by other evidence.(f)

Marshalling in Case of Charities.—In such cases as do not come within the provisions of the Mortmain and Charitable Uses Act, 1891, or other exception, where pure and impure personalty is bequeathed to charity, as where a testator has given his real and personal estate to trustees upon trust to sell and pay his debts and legacies, and to apply the residue to charitable purposes, the court will not marshal the assets so as to throw the debts and legacies exclusively on the proceeds of the real estate in order that the charitable bequest may take effect as far as

(a) *Walker v. Milne*, 11 Beav. 507; *Edwards v. Hall*, 6 De G. M. & G. 74; 25 L. J. 82, Ch.; *Entwistle v. Davis*, L. R. 4 Eq. 272.

(b) *Attree v. Hawe*, 9 Ch. Div. 337; 47 L. J. 863, Ch.; 38 L. T. Rep. N. S. 733; 26 W. R. 871; *Re Christmass*; *Martin v. Lacon*, 33 Ch. Div. 332; 55 L. J. 878, Ch.; 55 L. T. Rep. N. S. 197; *Re Parker*; *Wignall v. Park*, (1891) 1 Ch. 682; 60 L. J. 195, Ch.; 39 W. R. 346.

(c) *Emsley v. Mitchell*, (1894) 3 Ch. 704; 64 L. J. 92, Ch.; 71 L. T. Rep. N. S. 558.

(d) *Re David*; *Buckley v. Royal Life Boat Inst.* 41 Ch. Div. 168; 43 *Id.* 27; 59 L. J. 87 Ch.; 62 L. T. Rep. N. S. 141; 38 W. R. 162.

(e) *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

(f) *Edwards v. Pike*, 1 Cox 17; 1 Eden 267; *Re Spencer's Will*, 57 L. T. Rep. N. S. 519.

possible ; and the charitable legacies abate in the proportion of the pure to the impure personalty.(a)

But if the testator has directed that the charitable legacies are to be paid out of his pure personalty, or if a clear intention to this effect can be gathered from the will, it is otherwise ; for the testator has in such cases himself (so to speak) marshalled his assets.(b)

Doctrine of Cy-près.—Gifts to charities are, however, so far favoured, that where the donor declares his intention in favour of charity generally, without any defined objects, or in favour of defined objects which fail, the court will sustain the bequest ; and where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose, or, as it is technically termed, *cy-près*.(c)

Therefore where a testator gave his property “to the following religious societies, viz., to be divided in equal shares among them,” without naming the objects, it was held that the testator’s personal estate was subject to a trust for charitable purposes, and a scheme was directed.(d)

But when the gift shows no general charitable intention but is for the benefit of a particular charity by name, which, though once existent, has ceased to exist at the time of the testator’s death, this doctrine is not applied, and the bequest lapses and falls into the residue.(e)

Aliens.—Since the Naturalisation Act, 1870 (33 Vict. c. 14), property, real or personal, except a share in a British ship, may be devised or bequeathed to an alien.

Felons.—As already(f) shown by 33 & 34 Vict. c. 23, escheat and forfeiture for treason or felony (except forfeiture consequent on criminal outlawry) are abolished ; therefore it appears that, subject to the estate of the felon’s administrator under the Act, he may take by devise or bequest.(g)

Attesting Witnesses.—By 1 Vict. c. 26, if a beneficial devise or legacy (save a charge for payment of debts) be given to an attesting witness, or to the husband or wife of an attesting witness, the gift is void (sect. 15).

Where a solicitor, who is a trustee under a will containing a clause enabling him to charge profit costs, attests the will, he is precluded from

(a) Jarm. Wills, 195, 196, 5th edit. ; *Re Hill’s Trusts*, 16 Ch. Div. 173 ; *Re Somers-Cocks*, (1895) 2 Ch. 449 ; 65 L. J. 49, Ch. ; 73 L. T. Rep. N. S. 58 ; 44 W. R. 106.

(b) *Gaskin v Rogers*, L. R. 2 Eq. 284 ; 14 W. R. 707 ; *Wigg v. Nicoll*, L. R. 14 Eq. 92 ; 26 L. T. Rep. N. S. 935 ; 20 W. R. 738 ; *Wills v. Bourne*, L. R. 16 Eq. 487 ; 43 L. J. 89, Ch. ; *Re Arnold*, 37 Ch. Div. 637 ; 57 L. J. 682, Ch.

(c) Story’s Eq. sect. 1169 ; Jarm. Wills, 204, 5th edit.

(d) *Re White*, (1893) 2 Ch. 41 ; 62 L. J. 342, Ch. ; 68 L. T. Rep. N. S. 187 ; 41 W. R. 683 ; see also *Biscoe v. Jackson*, 35 Ch. Div. 461 ; 56 L. J. 93, 540 ; 56 L. T. Rep. N. S. 753 ; 35 W. R. 152, 554.

(e) *Russell v. Kellet*, 3 Sm. & G. 264 ; *Re Rymer*, (1895) 1 Ch. 19 ; 64 L. J. 86 Ch. ; 71 L. T. Rep. N. S. 590 ; 43 W. R. 87.

(f) *Ante*, p. 23.

(g) See Theob. Wills, 99, 4th edit. ; Jarm. Wills, 46, 47, 5th edit.

making such charges by section 15 of the Act.(a) But a gift to a mere trustee who attests the will is valid.(b)

And a legatee under a will does not lose his legacy by attesting a codicil which confirms the will.(c) So where a will, attested by a legatee, is afterwards republished by a codicil attested by other witnesses, the gift to the legatee is made good.(d)

Where there is a gift to a class, and a member of the class attests the will, he is thereby excluded from taking as one of the class.(e)

The marriage, *after* attestation of a will by a devisee to an attesting witness, does not avoid the devise.(f)

Infants.—A child *en ventre sa mère* may take by devise or bequest.(g)

Description of Objects.—Although the objects of the testator's bounty should be correctly described, it is sufficient that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial.(h)

Ambiguity.—In case of a *latent* ambiguity as to the name or description of a legatee or devisee, that is where the will appears on its face certain and free from ambiguity, but the ambiguity is introduced by something extrinsic, evidence may be given to clear up the ambiguity.(i) Such evidence is admissible to show which of two persons answering the same name was intended, as where the devise was to "my nephew Joseph Grant," and it appeared that the testator's brother had a son named Joseph Grant, and that the brother of the testator's wife also had a son of that name, and it was held that the description "my nephew" was applicable to both Joseph Grants, and therefore a latent ambiguity was disclosed, and parol evidence was admitted to show which Joseph Grant was meant by the testator.(k) It should be mentioned that although this is a decision of the Exchequer Chamber doubts have been thrown upon it.(l)

(a) *Re Pooley*, 40 Ch. Div. 1; 58 L. J. 1 Ch.; 60 L. T. Rep. N. S. 73.

(b) *Cresswell v. Cresswell*, L. R. 6 Eq. 69.

(c) *Gurney v. Gurney*, 3 Drew. 208; 24 L. J. 656, Ch.; *Re Marcus*, 56 L. J. 830, Ch.; 57 L. T. Rep. N. S. 399.

(d) *Anderson v. Anderson*, L. R. 13 Eq. 381; 41 L. J. 247, Ch.; 20 W. R. 313; *Re Trotter*, (1899) 1 Ch. 764; 68 L. J. 363, Ch.; 80 L. T. Rep. N. S. 647.

(e) *Fell v. Biddulph*, L. R. 10 C. P. 701; 44 L. J. 402 C. P.; 32 L. T. Rep. N. S. 864; 23 W. R. 913.

(f) *Thorpe v. Bestwick*, 6 Q. B. Div. 311; 50 L. J. 320, Q. B.; 44 L. T. Rep. N. S. 180; 29 W. R. 631.

(g) *Rawlins v. Rawlins*, 2 Cox 425; *Trower v. Butts*, 1 S. & S. 181; *Mogg v. Mogg*, 1 Mer. 655.

(h) Jarm. Wills, 348, 5th edit.

(i) See Broom's Max. 561, 566, 6th edit.; Jarm. Wills, 400, 402, 5th edit.; *Re Waller*, 68 L. J. 526, Ch.; 80 L. T. Rep. N. S. 701; 47 W. R. 563, C. A.

(k) *Grant v. Grant*, L. R. 5, C. P. 727; 22 L. T. Rep. N. S. 233; 18 W. R. 576.

(l) *Wells v. Wells*, L. R. 18 Eq. 504; and see *post*, sub. tit., "Nephews and Nieces."

If the ambiguity is *patent* extrinsic evidence is in most cases inadmissible to explain it.(a) Therefore, where a blank is left for the name of the devisee or legatee, parol evidence cannot be admitted to show who was intended.(b)

And where there is a gift to a class "with the exception of _____," the gift to the class is good, and the blank as to exclusion is inoperative.(c)

So on a gift to a class, as "for all the sons and daughters of R. including _____ the illegitimate _____ of the said R., as tenants in common," it was held a good gift to the legitimate sons and daughters of R., exclusive of her illegitimate children.(d)

But a blank may be supplied from the context of the *will itself*; as where a testatrix, after directing that her debts should be paid by her executrix thereafter named, gave all her property to absolutely, and appointed her niece her executrix. This was held to be an effectual gift of the property to the niece.(e)

And if instead of a complete blank there are any words to which a reasonable meaning may be attached, parol evidence may be given to show what that meaning is. Thus, where a blank is left for the Christian or surname, parol evidence may be admitted to show who was intended(f). As to a gift for general charitable purposes where blanks are left see *ante*, p. 530.

Where a legacy is given to a person by name, an erroneous description of him will not defeat the legacy if there is some one to answer the name. As where the gift was to C. M. S. and C. E., legitimate son and daughter of C. S., and it was held a good bequest to them, although they turned out to be illegitimate.(g)

On the other hand, if a legacy be given to one of a partly wrong name, but by a correct description, the person answering the description will take. Thus a bequest to the "Rev. Charles Smith, of Stapleton Tawney, Clerk," was held to apply on evidence to a person who answered the description, but whose Christian name was *Richard*.(h)

Equivocation.—An ambiguity may also arise when a testator makes a gift having two subjects or objects answering the description, which is called an *equivocation*. Thus when a person devises his Manor of Dale, and it is found that he has two manors of that name, evidence may be adduced to show which of them was intended. This principle has been more frequently applied to the objects of the gift.(i)

(a) *Broom's Max.* 562, 6th edit.; *Theob. Wills*, 221, 4th edit.

(b) *Baylis v. Attorney-General*, 2 Atk. 239; *Hunt v. Hort*, 3 Bro. C. C. 311.

(c) *Illingworth v. Cooke*, 9 Hare 37; 20 L. J. 512, Ch.

(d) *Gill v. Bagshaw*, L. R. 2 Eq. 746; 35 L. J. 842, Ch.; 14 W. R. 1012.

(e) *Re Harrison*; *Turner v. Hellard*, 30 Ch. Div. 390; 55 L. J. 799, Ch.; 53 L. T. Rep. N. S. 799; 34 W. R. 420, C. A.

(f) *Price v. Page*, 4 Ves. 679; *In bonis De Rosas*, 2 Pr. Div. 66, 69.

(g) *Standen v. Standen*, 2 Ves. 589; *Re Blackman*, 16 Beav. 377.

(h) *Smith v. Coney*, 6 Ves. 42; *Dowset v. Sweet*, Amb. 175.

(i) *Jarm. Wills*, 402, 5th edit.

Thus where a legacy was bequeathed to "W. R., my farming man," and the testator had, at the time of his death, two farming men of that name in his service, evidence of the testator's declarations in favour of one of them was admitted.(a)

If part of the description applies to two persons in common, and another part to neither of them, evidence may be admitted to show which was intended. As where a legacy was given to Sophia Still, daughter of Peter Still, who had two daughters, but neither of them was named Sophia.(b)

Evidence.—As to the reception of extrinsic evidence to clear up the ambiguity on the above points, it has been held by the House of Lords that evidence of the declarations of a testator as to whom he intended to benefit can only be received where the description of the legatee or the thing bequeathed is equally applicable in all its parts to two persons, or to two things. But evidence of the circumstances, the habits, and the state of the testator's family at the time he made the will is admissible, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be with sufficient certainty applied.(c)

Gifts to persons filling certain characters.—A false character attributed by a testator to a legatee will not affect the validity of the legacy unless the false character has been acquired by a fraud which has deceived the testator.

Wife.—Thus, on a bequest to "my wife," where the marriage was void in consequence of the supposed wife having a husband living at the time of the testator's marriage with her, of which he was unaware, and no fraud on her part being shown, she takes the legacy.(d) A like result seemingly follows where after the date of the will the wife obtains a decree of nullity of the marriage.(e) But where at the time of the marriage the woman had, to her knowledge, a husband living, and falsely represented herself as a widow, the bequest was held void. However, the testator also bequeathed the residue of his property to his "step-daughter," who was the daughter of the supposed wife, and this bequest was held good, as the supposed step-daughter was innocent of any fraud.(f)

After probate of a will of personalty has been granted, however, the Probate Division has exclusive jurisdiction to deal with the question of fraud.(g)

(a) *Reynolds v. Whelan*, 16 L. J. 434, Ch.; and see *Jefferies v. Michell*, 20 Beav. 15; *In bonis Ashton*, (1892) P. 83; 61 L. J. 85, Pr. & D.; 67 L. T. Rep. N. S. 325.

(b) *Still v. Hoste*, 6 Mad. 192.

(c) *Charter v. Charter*, L. R. 7, H. L. Cas. 364.

(d) *Giles v. Giles*, 1 Keen 685; 5 L. J. 46, Ch.; *Re Pitts*, 27 Beav. 576; 1 L. T. Rep. N. S. 153.

(e) *Re Boddington*, 22 Ch. Div. 597; 25 Ch. Div. 685; 53 L. J. 475, Ch.; 50 L. T. Rep. N. S. 761; 32 W. R. 448; but see *Re Morrisson*, *infra*.

(f) *Wilkinson v. Joughin*, L. R. 2 Eq. 319; 35 L. J. 684, Ch.

(g) *Meluish v. Milton*, 3 Ch. Div. 27; 45 L. J. 836, Ch.; 24 W. R. 892; 35 L. T. Rep. N. S. 82.

Although a gift to a person's wife who is afterwards divorced may or may not be valid, as there are conflicting decisions on the point, (a) a gift to her of an annuity "so long as she shall continue my widow" is void if she is so divorced, as she is not the testator's widow at the time of his death. (b)

It has been shown (*ante*, p. 516) that a will, as to the property comprised in it, now speaks from the death; but as to the objects of the testator's bounty the law appears to remain unchanged by 1 Vict. c. 26, s. 24. (c) Thus, it has been held that a devise or bequest to the wife of A., who has a wife at the date of the will, goes to that wife and not to any wife whom he may at any time afterwards marry. (d)

Servants.—So a gift to the testator's servants simply, without adding a condition that they must be in his service at his decease, has been held to include his servants at the date of his will, although some of them subsequently quit his service. (e) And a bequest "to each man who shall have been in my employ over ten years," was held to include a man who had been in the testator's employ for fifteen years, but who was not in his employ at his death. (f)

A bequest to "servants" is not necessarily confined to indoor servants, but will include outdoor servants who are continually employed at weekly wages; but not those occasionally employed. (g) However, a bequest to "servants in my domestic establishment," or to my "household servants," includes only indoor servants. (h)

Husband and Wife.—As to gifts to husband and wife and a third person, see *ante*, p. 410.

Unmarried.—The word "unmarried" is one of flexible meaning, and may mean "never having been married," or "not having a husband" at the time when the gift is to take effect, its primary meaning is never having been married. The word must, however, be construed according to the context in which it is found. (i) Thus, where the gift was to J. H., if she be "sole and unmarried" at the death of the tenant for life, and J. H. afterwards married, but the marriage was dissolved by the Divorce Court before the death of the tenant for life, and it was held, on the

(a) See *Re Boddington*, *sup.*; *Bullmore v. Wynter*, 22 Ch. Div. 619; 52 L. J. 456, Ch.; 48 L. T. Rep. N. S. 309; *Re Morrisson*, 40 Ch. Div. 30; 59 L. T. Rep. N. S. 847; 58 L. J. 80, Ch.; 37 W. R. 91.

(b) *Re Boddington*, *sup.*

(c) Jarm. Wills, 302, 5th edit.

(d) *Re Burrows*, 10 L. T. Rep. N. S. 184; *Firth v. Fielden*, 22 W. R. 622; but see *contra*, *Re Lynes*, L. R. 8 Eq. 65; 38 L. J. 471, Ch.; 20 L. T. Rep. N. S. 735; *Re Drew*, (1899) 1 Ch. 336; 68 L. J. 157, Ch.; 79 L. T. Rep. N. S. 656; 47 W. R. 265.

(e) *Parker v. Marchant*, 1 Y. & Col. C. C. 290; 2 *Id.*, 279.

(f) *Re Sharland*, (1896) 1 Ch. 517; 65 L. J. 280, Ch.; 74 L. T. Rep. N. S. 20; see, however, *Re Marcus*, 56 L. J. 830, Ch.; 57 L. T. Rep. N. S. 399.

(g) *Thrupp v. Collet*, 26 Beav. 147.

(h) *Ogle v. Morgan*, 1 De G. M. & G. 359; *Re Drax*, 57 L. T. Rep. N. S. 475.

(i) *Dalrymple v. Hall*, 16 Ch. Div. 715; 50 L. J. 302, Ch.; 29 W. R. 421; *Re Sergeant*; *Mertens v. Walley*, 26 Ch. Div. 575; 54 L. J. 414, Ch.; 32 W. R. 987; *et ante*, p. 484.

construction of the whole will, that the word unmarried meant not having a husband at the above period, and she was held entitled, thus giving the word its secondary meaning.(a)

Children.—A gift by will to children or issue, *prima facie*, means legitimate children or issue;(b) but the will itself and surrounding circumstances may show that the word is not used in its primary meaning.(c)

However, a gift to children, *prima facie*, includes children by any marriage.(d) But the children of a first marriage may be excluded by a plain intention on the testator's part.(e)

Again, children means immediate offspring, and does not include grandchildren, except from necessity; as if the will would otherwise be inoperative.(f)

And it has recently been held that if a testator gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the grandchildren will take. But if the testator mentions the children of several deceased persons, as children of the late A., the late B., and the late C., and some of these have left children, and one has left grandchildren only, then the word children is read in its ordinary meaning, and excludes the grandchildren; for otherwise the word children would have to be read in two different senses. And if the testator himself has, by his will, shown an intention to use the word children in its ordinary meaning, by having used the word grandchildren as well as children, the grandchildren will be excluded.(g)

If there be a gift to the children of A. and B., the proper grammatical construction of the words is that the children of A., and B. himself and not his children, take.(h) In order to enable the children of B. to take it would be necessary to insert the word "of," so that it should read the children of A. and of B.(i)

On a gift to A. and to the children of B. to be equally divided, they take *per capita*;(k) so on a gift to the children of A. and of B., all the

(a) *Re Lesingham's Trusts*, 24 Ch. Div. 703; 49 L. T. Rep. N. S. 235; 32 W. R. 116.

(b) *Wilkinson v. Adam*, 1 Ves. & B. 462; *Dorin v. Dorin*, L. R. 7, H. L. Cas. 568; 31 L. T. Rep. N. S. 281; 45 L. J. 652, Ch.

(c) *Hill v. Crook*, L. R. 6, H. L. Cas. 265; 42 L. J. 702, Ch.; 22 W. R. 137; *Re Haseldine*; *Grange v. Sturdy*, 31 Ch. Div. 511; 54 L. T. Rep. N. S. 322; 34 W. R. 327, C. A.

(d) *Barrington v. Tristram*, 6 Ves. 345; *Re Pickup's*, 30 L. J. 278, Ch.; 4 L. T. Rep. N. S. 85; 9 W. R. 251.

(e) *Lovejoy v. Crafter*, 35 Beav. 149.

(f) *Radcliffe v. Buckley*, 10 Ves. 195; *Moor v. Raisbeck*, 12 Sim. 123.

(g) *Re Smith*; *Lord v. Hayward*, 35 Ch. Div. 558; 56 L. J. 771, Ch.; 56 L. T. Rep. N. S. 878; 85 W. R. 663.

(h) *Lugar v. Harman*, 1 Cox 250; *Re Featherstone*, 22 Ch. Div. 111; 52 L. J. 75, Ch.; 47 L. T. Rep. N. S. 538; 31 W. R. 89.

(i) *Re Featherstone*, sup.; *Peacock v. Stockford*, 3 De G. M. & G. 73.

(k) *Dowding v. Smith*, 8 Beav. 541; 10 L. J. 235, Ch.

children of A. and B. will take *per capita*, (a) unless a different intention can be gathered from the will. Thus, where the annual income until distribution of the capital is given *per stirpes*, that has been held sufficient for presuming that the capital was to go *per stirpes*. (b)

Although, as already shown, the primary meaning of children is legitimate children, yet illegitimate children existing at the date of the will may take under a gift to children in two classes of cases: (1) Where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest, as in a gift "to the children of my daughter Jane," she being dead and having left only illegitimate children. (2) When upon the face of the will and from surrounding circumstances there appears an intention of the testator that the term children should apply to and include illegitimate children. As if a testator describes A. as the wife of B., knowing that she is not his lawful wife, and gives property to her for life with a remainder to her children, this will include the illegitimate children of A. by B. (c)

And it seems now that a gift to children generally may apply to existing illegitimate children, as well as to legitimate children, where there is a clear intention in the will to that effect. (d)

Where illegitimate children have acquired names by reputation, they may be described by those names. An illegitimate child being thus identified, takes as *persona designata*, and his illegitimacy is not material. (e) If an illegitimate child has not acquired a name by reputation, he or she should be described as the child of the mother, or by such other description as will sufficiently identify him or her.

A child *en ventre sa mère* is generally regarded as a child *in esse*; (f) and a bequest to a child *en ventre* of a particular woman, naming her, at the date of the will, is a valid gift, though such child be illegitimate. For the child is sufficiently described without its being necessary to prove that it was begotten by any particular man. (g)

And it seems that a gift to "all and every the children and child born of the said M. E. M. previous to my death" will include future illegitimate

(a) *Armitage v. Williams*, 27 B. 346; *Payne v. Webb*, L. R. 19 Eq. 26; 31 L. T. Rep. N. S. 637; 22 W. R. 43.

(b) *Brett v. Horton*, 4 Beav. 239; *Re Campbell*, 33 Ch. Div. 98; 55 L. T. Rep. N. S. 463; 55 L. J. 911, Ch.; 34 W. R. 629, C. A.; but see *Re Stone*, (1895) 2 Ch. 196; 64 L. J. 637, Ch.; 72 L. T. Rep. N. S. 815; 44 W. R. 235.

(c) *Hill v. Crook*, and *Re Haseldine*, ante, p. 535; *Dorin v. Dorin*, L. R. 7 H. L. 568, 575; *Re Horner*, 37 Ch. Div. 695; 57 L. J. 211, Ch.; 58 L. T. Rep. N. S. 103; 36 W. R. 348; *Re Harrison*, (1894) 1 Ch. 561; 63 L. J. 385; 70 L. T. Rep. N. S. 868.

(d) *Re Parker*, (1897) 2 Ch. 208; 66 L. J. 509, Ch.; 76 L. T. Rep. N. S. 421; 45 W. R. 536; *Re Walker*, (1897) 2 Ch. 238; 66 L. J. 622, Ch.; 77 L. T. Rep. N. S. 94; 45 W. R. 647.

(e) *Thomson v. Eastwood*, 2 App. Cas. 215.

(f) See ante, p. 531, et post.

(g) *Occleston v. Fullalove*, 9 Ch. App. 147; 43 L. J. 297, Ch.; 29 L. T. Rep. N. S. 785; 22 W. R. 305; *Crook v. Hill*, 3 Ch. Div. 773; 46 L. J. 119, Ch.; 24 W. R. 876.

children so born before the testator's death.(a) But there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity; as to "all and every my child and children," for this would necessitate an inquiry into the child's paternity, which the law does not allow.(b) And an illegitimate child both begotten and born after the testator's death cannot take under a will.(c)

The question whether a child is legitimate so as to be capable of taking under a gift to children in an English will is decided according to the law of the father's domicil, both in the case of real and personal estate. Thus a bequest or devise to a child born out of wedlock, but legitimated according to the law of the domicil of the child's parent, is valid.(d) However, a child illegitimate according to English law cannot *inherit* land in England.(e)

Rules for Ascertaining Class.—There are certain rules for ascertaining the class to take under a gift of a fund to children.

1. Under an immediate gift to children, without naming any period of distribution, those only, if any, who are in existence at the testator's death can take.(f) But if there be no child in existence at the testator's death, then the gift, though an immediate one, will extend to all the children who are afterwards born.(g)

2. A gift to children preceded by a life interest, includes children living at the testator's death, and also children who come into existence before the death of the tenant for life, whose death is made the period of distribution.(h)

3. On a gift to children, the distribution of whose shares is postponed until majority (or some other age), which none of the class has attained at the testator's death, such gift includes children living at the testator's death and also those who come *in esse* before the eldest attains the prescribed age.(i) But if any child has attained twenty-one at the testator's death, his share is then payable, and no subsequent child born will take.(k) Unless indeed maintenance and advancement are expressly authorised out of *vested* as well as out of presumptive shares, for then it

(a) *Re Hastie's Trusts*, 35 Ch. Div. 728; 56 L. J. 792, Ch.; 57 L. T. Rep. N. S. 168; 35 W. R. 632.

(b) *Re Bolton; Brown v. Bolton*, 31 Ch. Div. 542; 55 L. J. 398, Ch.

(c) *Crook v. Hill*, *sup.*

(d) *Re Andros*, 24 Ch. Div. 637; 52 L. J. 793, Ch.; 49 L. T. Rep. N. S. 163; 32 W. R. 30; *Re Grey's Trusts*, (1892) 3 Ch. 88; 61 L. J. 622, Ch.; 41 W. R. 60.

(e) *Doe d. Birtwhistle v. Vardill*, 6 Bing. N. C. 385; 19 Bl. N. S. 32; 7 Cl. & F. 895.

(f) *Viner v. Francis*, 2 Cox 190; 2 R. R. 29.

(g) *Weld v. Bradbury*, 2 Vern. 705; *Harris v. Lloyd*, Tur. & R. 310.

(h) *Ayton v. Ayton*, 1 Cox 327; *Holland v. Wood*, L. R. 11 Eq. 91; and see *Re Aylwin's Trusts*, L. R. 16 Eq. 585; *Re Bedson's Trusts*, 28 Ch. Div. 523, where the life interest was determinable on bankruptcy.

(i) *Andrews v. Partington*, 3 Bro. C. C. 401; *Gimblett v. Purton*, L. R. 12 Eq. 427; 40 L. J. 556, Ch.; 24 L. T. Rep. N. S. 793.

(k) *Gillman v. Daunt*, 3 K. & J. 48; Jarm. Wills, 1015, 5th edit.; *Re Knapp's Settlement*, (1895) 1 Ch. 91.

shows that the trustees were to retain the fund after some had acquired a vested interest, and children born after the first attains such interest will be left in.(a)

4. When the gift is of a particular sum to each of the children, the legacies vest at the testator's death, and children born afterwards are not entitled to participate.(b) And if there are no children in existence at the testator's death the gift fails.(c)

5. A child *en ventre sa mère* at the time when the class is ascertained is admitted to a share, even if the word "born" or "living" be added to the description.(d) However, in order that such child may take he must have been begotten during lawful wedlock, the marriage of his parents before the birth but after the time of distribution will not let in such child.(e) And a child *en ventre* is treated as born for the purpose of receiving a benefit, and not for the purpose of postponing the period of distribution.(f) But it has recently been held that a child *en ventre sa mère* is considered as born, for the purpose of benefiting its parent.(g)

It is necessary to remember, however, that a bequest to several persons *nominatim* is not a gift to a class. Thus, a gift to "the children of L. D., to wit, J. D., E. D., and A. D.," is not a gift to a class, but to individuals.(h) And when the number of the donees is specified, as where the testator spoke of his "nine children," that amounts to mentioning them by name.(i)

On the other hand, if the devise or bequest be to certain children of a testator by name, but adding also, and his child or children (if any) to be born after the date of his will, that amounts to a gift to a class, as all the children to be born afterwards are to participate.(k) And the exclusion of a certain member of the class is not sufficient to convert a gift to a class into one to individuals as a gift to all the children of A. except his eldest son.(l)

Where there is a gift to children as A. may appoint without any gift in

(a) *Bateman v. Gray*, L. R. 6 Eq. 215; 37 L. J. 592, Ch.; 16 W. R. 962.

(b) *Butler v. Lowe*, 10 Sim. 317.

(c) *Rogers v. Mutch*, 10 Ch. Div. 25; 48 L. J. 133, Ch.; 27 W. R. 131.

(d) See cases cited, *ante*, p. 531, note (g) *et infra*; but see *Garratt v. Weeks*, L. R. 20 Eq. 647.

(e) *Re Corlass*, 1 Ch. Div. 460; 45 L. J. 118, Ch.; 38 L. T. Rep. N. S. 630; 24 W. R. 204.

(f) *Pearce v. Carrington*, 8 Ch. App. 969; 42 L. J. 516, Ch.; 28 L. T. Rep. N. S. 659; 21 W. R. 729; *Blasson v. Blasson*, 2 De G. J. & S. 665; 11 L. T. Rep. N. S. 353.

(g) *Re Burrows*, (1895) 2 Ch. 497; 65 L. J. 52, Ch.; 73 L. T. Rep. N. S. 148; 43 W. R. 683.

(h) *Bain v. Lescher*, 11 Sim. 397.

(i) *Re Smith's Trusts*, 9 Ch. Div. 117; *Re Stansfield*, 15 Ch. Div. 84; 43 L. T. Rep. N. S. 310.

(k) *Re Stanhope's Trusts*, 27 Beav. 201; *Re Jackson*, 25 Ch. Div. 162; 32 W. R. 394.

(l) *Dimond v. Bostock*, 33 L. T. Rep. N. S. 217; 10 Ch. App. 859.

default of appointment, and no appointment is made, it is said that similar rules apply as to the period at which the class is to be ascertained.(a)

6. The rule for ascertaining the class to take on a gift of an aggregate sum to children of A. payable at twenty-one (*ante*, p. 537) is said to be one of convenience, and is not applicable to similar bequests of *income*; for in this event members of the class attaining twenty-one after the first member has attained twenty-one will be admitted to share.(b) But where the gift of income is to children *simpliciter*, without any words as to their attaining majority, then the gift is confined to children living at the testator's death, if any are then in existence, to the exclusion of afterborn children.(c)

7. As to realty: It has been held that a devise of real estate to the children of A., without any preceding estate of freehold, may be treated as an executory devise, so that all the children born at the testator's death and afterwards coming into existence may take; and that the doctrine of the common law that an estate of freehold cannot be limited to commence in future does not apply.(d) If the devise is to the children of A., born or to be born, the devise would be executory and let in all the children, whether born before or after the testator's death.(e)

A devise of the legal estate to A. for life with remainder to the children of B. is, in case of a will executed before 2nd August, 1877, a devise of a contingent remainder to such children, and only those children can take whose interest becomes vested before the determination of the life estate. And if there are no children whose interests are then vested, the devise to them fails;(f) for not only must a contingent remainder, if it amounts to a freehold, have a particular estate of freehold to support it, but must vest the moment the particular estate determines.(g) However, if the gift in remainder shows that the testator intended that children should take who had not attained vested interests at the death of the tenant for life, the future estate is construed as an executory devise and not as a contingent remainder.(h) And if the legal estate be vested in trustees, that would prevent the contingent remainders from failing.(i)

And by 40 & 41 Vict. c. 33, every contingent remainder created by an instrument executed after the passing of the Act (2nd August, 1877),

(a) See Theob. Wills, 262, 263, 4th edit.; Jarm. Wills, 519, 1011, n. 5th edit.

(b) *Re Wenmoth's Estate*, 37 Ch. Div. 266; 57 L. J. 649, Ch.

(c) *Re Powell*; *Crosland v. Halliday*, (1898) 1 Ch. 227; 67 L. J. 148, Ch.; 77 L. T. Rep. N. S. 649; 46 W. R. 231.

(d) Theob. Wills, 260, 4th edit.; Jarm. Wills, 831, 832, 1024, 5th edit.

(e) *Mogg v. Mogg*, 1 Mer. 654; *Eddowes v. Eddowes*, 30 Beav. 603.

(f) *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. 191, Ch.; 16 W. R. 642; *Percival v. Percival*, L. R. 9 Eq. 386; Theob. Wills, 260, 4th edit.

(g) *Fearne*, Cont. Rem. 281, &c., 10th edit.

(h) *Re Lechmere and Lloyd*, 18 Ch. Div. 524; 45 L. T. Rep. N. S. 551; *Miles v. Jarvis*, 24 Ch. Div. 633; 52 L. J. 796, Ch.; 49 L. T. Rep. N. S. 162; *Dean v. Dean*, (1891) 3 Ch. 150; 66 L. J. 553, Ch.; 65 L. T. Rep. N. S. 65; 39 W. R. 568.

(i) *Re Eddels*, L. R. 11 Eq. 559; 40 L. J. 316, Ch.; 19 W. R. 815; *Astley v. Micklethwaite*, 15 Ch. Div. 59; 49 L. J. 672, Ch.; 43 L. T. Rep. N. S. 58; 28 W. R. 811.

or by will or codicil revived or republished thereafter, in tenements or hereditaments, which would have been valid as a springing or shifting use or executory devise had it not had a sufficient estate to support it as a contingent remainder shall, if the particular estate determines before the contingent remainder vests, be capable of taking effect as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, &c.(a)

From the rules above stated as to the periods for ascertaining the class of children to take, it will be seen that it is advisable to state whether future born children are to be included. Also whether the testator intends to confine the objects to such children as shall be living at the time of his death, or to extend his bounty to such as shall be living at the time the fund is to be distributed; and whether, in case any of such children should die before the period of distribution arrives, their shares are to be transmissible to their representatives. And generally to so frame the gift as to prevent any question arising as to the testator's meaning.

Dying without Children.—Questions have arisen whether a gift over in case of a prior devisee or legatee dying without children, means without *having had* or without *leaving* a child or children. They may be stated thus:

1. Where the expression is, if the legatee should die "without any child or children," then over, this means without child or children living at the death of the legatee.(b)

2. If the words are "without having any child or children," they mean without having had any child; so that on a gift to A. with a direction that if he dies without having any child the property should go over, and A. has had a child, the gift over will not take effect though the child dies.(c)

3. If the gift over is upon death "without leaving" children or issue, the word leaving will generally be construed as meaning children or issue living at the death of the legatee.(d)

4. However, the word "leaving" has also been construed as "having," in order to prevent a clear previous vested gift from being divested.(e)

Younger children, first, or eldest son.—It has already been shown(f) that in a settlement of realty by a parent or person in *loco parentis*, the words first or eldest son do not necessarily mean "firstborn," but the son who takes the family estate; and that where provision is made for

(a) See hereon Jarm. Wills, 832, 833, 5th edit.

(b) *Thickness v. Liege*, 3 Bro. P. C. 365; *Jeffreys v. Conner*, 28 Beav. 228; 3 L. T. Rep. N. S. 45; *Re Booth*, (1900) 1 Ch. 768.

(c) *Wall v. Tomlinson*, 16 Ves. 413; *Bell v. Phyn*, 7 Ves. 453; *Jeffreys v. Conner*, sup.

(d) *Re Ball*; *Slattery v. Ball*, 40 Ch. Div. 11; 58 L. J. 232, Ch.; 37 W. R. 37; overruling *White v. Hight*, 12 Ch. Div. 751.

(e) *White v. Hill*, L. R. 4 Eq. 265; 16 L. T. Rep. N. S. 821; *Re Brown's Trust*, L. R. 16 Eq. 239; 43 L. J. 84, Ch.; 21 W. R. 721; *Re Ball*, sup.

(f) *Ante*, p. 417.

younger children, at what period the class of younger children is to be ascertained.

However, except in the case of portions, or of a specially qualifying context, in limitations of realty by will, eldest son means "firstborn." (a)

And in a gift to the first or second son of A. the reference is *prima facie* to the order of birth. But if a first or second son is dead at the date of the will to the testator's knowledge, the term will be construed to mean first or second son at the testator's death. (b)

Time of ascertaining younger children.—Where there is an immediate gift by will to younger children it seems the class must be ascertained at the testator's death, there being no other period to which the words can be referred. (c) But where the gift is to younger children upon some contingency, the cases are somewhat conflicting. (d)

Nephews and Nieces.—A gift to nephews and nieces ordinarily means the children of a brother or sister, including those of the half blood; (e) and does not extend to great-nephews and nieces. (f)

However, if the testator has at the date of his will and death no nephews and nieces of his own, but there are nephews and nieces of his wife, they will then take under the description of nephews and nieces. (g) And a bequest to his "nephews and nieces on both sides," was held to include his wife's nephews and nieces. (h)

Cousins.—A bequest to "cousins" without anything to explain the testator's meaning includes first cousins only. (i) But the word may sometimes be understood in a popular sense, as where the gift was "to my cousin H. C.," who was only the wife of the testator's cousin. (k)

The term "second cousins" primarily means persons having the same great-grandfathers and great-grandmothers. And on a gift to second cousins, the children or grandchildren of first cousins will not be included. (l) But a gift to second cousins will let in first cousins once

(a) *Bathurst v. Errington*, 2 App. Cas. 698; 46 L. J. 748, Ch.; 25 W. R. 908; 37 L. T. Rep. N. S. 838; *Meredith v. Treffry*, 12 Ch. Div. 170; 48 L. J. 337, Ch.

(b) *King v. Bennett*, 4 M. & W. 36; *Thompson v. Thompson*, 1 Coll. 388; Jarm. Wills, 1071, 5th edit.

(c) *Coleman v. Seymour*, 1 Ves. 209; Jarm. Wills, 1062, 5th edit.

(d) See Jarm. Wills, 1065, 5th edit.; Theob. Wills, 234, 4th edit.; 7 Byth. & Jarm. 630, 4th edit.

(e) *Grieves v. Rawley*, 10 Hare 63; 22 L. J. 625, Ch.; and see *Re Reed*, 57 L. J. 790, Ch.; 36 W. R. 682.

(f) *Falkner v. Butler*, Ambl. 514; *Re Blower's Trusts*, 6 Ch. App. 351; 42 L. J. 24, Ch.; 19 W. R. 666.

(g) *Sherratt v. Mountford*, 8 Ch. App. 928; and see *Re Fish*, (1894) 2 Ch. 83; 63 L. J. 437, Ch.; 70 L. T. Rep. N. S. 825; 42 W. R. 520, C. A.

(h) *Frogley v. Phillips*, 3 De G. F. & J. 466; 3 L. T. Rep. N. S. 718; and see *ante*, p. 531.

(i) *Stoddart v. Nelson*, 6 De G. M. & G. 68; 25 L. J. 116, Ch.

(k) *Re Taylor*, 34 Ch. Div. 255; 56 L. J. 171, Ch.; 56 L. T. Rep. N. S. 649; 35 W. R. 186.

(l) *Re Parker*, 15 Ch. Div. 528; 17 *Id.*, 262; 50 L. J. 639, Ch.; 44 L. T. Rep. N. S. 885; 29 W. R. 855.

removed, if there are no second cousins either at the date of the will or at the testator's death or afterwards.(a)

Issue.—A bequest of personal property to issue as persons described, includes children or more remote descendants who are in existence at the time of vesting in possession. Thus, where the bequest was to A. or her issue, and A. died in the testator's lifetime, leaving a son and two grandchildren, it was held that the three took the legacy.(b)

And even in the case of a devise of realty to the issue of A., all the issue will take as joint tenants,(c) and if the will be made since 1 Vict. c. 26, s. 28, in fee unless a contrary intention appears. Still, in the case of realty, if the will shows an intention to keep the devised estate together in a single line of owners, the issue will take successively in tail.(d) And it must be remembered that the word "issue," when preceded by a life estate in the ancestor, is usually construed as a word of limitation and not of purchase, and as such confers an estate tail on such ancestor, as will be shown hereafter.

The word "issue" may also be explained by the context to mean *children*. As where after a bequest to several persons the will declares that if such persons are not living at the testator's decease, their issue should take their parents' share.(e)

But if after such a bequest there follows a gift over on a failure of children or issue generally, the word issue is not confined to children.(f)

And the testator himself may show that by the word issue he meant children, as where after a gift to "the issue of F. H.," &c., he added "and if but one then for such only *child*."(g)

Descendants.—A gift to the descendants of A. means all who proceed from A.'s body and are living at the time of distribution.(h)

The word "descendants" is less flexible than issue, and requires a stronger context to confine it to children.(i)

Relations.—A bequest to "relations" is construed to mean the persons who would be entitled under the statutes of distributions to take the personal estate on an intestacy.(k) The same rule applies where the

(a) *Re Bonner*, 19 Ch. Div. 201; 51 L. J. 83, Ch.; 45 L. T. Rep. N. S. 470; 30 W. R. 58.

(b) *Davenport v. Hanbury*, 3 Ves. 257; and see *Re Corlass*, 1 Ch. Div. 460; 45 L. J. 118, Ch.; 33 L. T. Rep. N. S. 630; 24 W. R. 204.

(c) *Cook v. Cook*, 2 Vern. 545; *Mogg v. Mogg*, 1 Mer. 654.

(d) *Allgood v. Blake*, L. R. 7 Ex. 339, 361; 8 *Id.*, 160.

(e) *Sibley v. Perry*, 7 Ves. 522; *Martin v. Holgate*, L. R. 1, H. L. Cas. 175; 35 L. J. 789, Ch.; 15 W. R. 135; see also *Re Birks*; *Kenyon v. Birks*, 80 L. T. Rep. N. S. 257; (1899) 1 Ch. 703.

(f) *Ross v. Ross*, 20 Beav. 645; *Ralph v. Carrick*, 11 Ch. Div. 873; 48 L. J. 801, Ch.; 40 L. T. Rep. N. S. 505.

(g) *Re Hopkins*, 9 Ch. Div. 131; 47 L. J. 672, Ch.; 26 W. R. 629.

(h) *Crossley v. Clare*, 3 Sw. 320; *Butler v. Stratton*, 3 Bro. C. C. 367.

(i) *Ralph v. Carrick*, *sup.*

(k) *Jarm. Wills*, 972, 5th edit.; *Eagles v. Le Breton*, L. R. 15 Eq. 148.

devise is of real estate to relations.(a) Also when the gift is to "near relations,"(b) or to "poor relations."(c)

When, however, the gift is to "nearest relations," the persons to take are not ascertained by the statutes of distributions, but whosoever is the nearest will be entitled to the exclusion of more remote relations.(d)

On a gift to relations *simpliciter*, although the objects to take are ascertained by the statutes of distributions, they take *per capita* as joint tenants.(e) But if the will shows a different intention, as where the gift was to "my relatives share and share alike as the law directs," they will take *per stirpes* and not *per capita*.(f)

Next of Kin.—A gift to "next of kin" *simpliciter*, without explanatory context, means the nearest blood relations of the *propositus*, and they take as joint tenants, and are determined without reference to the statutes of distributions.(g)

All who are in *equal* degree will be included in the gift. Thus, where the gift was to "the next of kin of E. M. at her decease," and she died leaving a child, and her father and mother, it was held that the parents took equally with the child, being of equal degree of kindred. It is true that, although children and parents are in equal degree, the law gives a preference to the child over a parent in administrative distribution, but not in a bequest to next of kin.(h)

A reference by the testator to the Statute of Distributions will, however, admit all kindred who are entitled under the statute, and they will generally take as tenants in common.(i)

A gift to next of kin will not include a husband,(k) or a wife, for they are not next of kin.(l)

A devise of *land* to the nearest of kin by way of "heirship," will go to the heir.(m)

The periods for ascertaining who take on gifts to next of kin seem to be the following :

- (1) Where the gift is simply to the testator's own next of kin it

(a) *Doe d. Thwaites v. Over*, 1 Taunt. 263. (b) *Whithorn v. Harris*, 2 Ves. 527.

(c) *Brunsdon v. Woolridge*, 1 Dick 380; Will. Exors. 980, 9th edit.

(d) 2 Will. Exors. 982, 9th edit.; *Smith v. Campbell*, 19 Ves. 400; *Marsh v. Marsh*, 1 B. C. C. 293; *Halton v. Foster*, 3 Ch. App. 505; 37 L. J. 547, Ch.; 18 L. T. Rep. N. S. 623; 16 W. R. 683.

(e) *Tiffin v. Longman*, 15 Beav. 279; *Eagles v. Le Breton*, sup.

(f) *Fielden v. Ashworth*, L. R. 20 Eq. 410; 33 L. T. Rep. N. S. 197.

(g) *Elmsley v. Young*, 2 My. & K. 780; 4 L. J. 8, Ch.; *Withy v. Mangles*, 10 Cl. & F. 215; 10 L. J. 391, Ch.; *Halton v. Foster*, sup.

(h) *Withy v. Mangles*, sup.

(i) *Nichols v. Haviland*, 1 K. & J. 504; *Bullock v. Downes*, 9 H. L. Cas. 1; *Re Ranking's Settlement*, L. R. 6 Eq. 601; *Re Gray*, (1896) 2 Ch. 802; 75 L. T. Rep. N. S. 407.

(k) *Watt v. Watt*, 3 Ves. 244.

(l) *Garrick v. Camden*, 14 Ves. 372; *Lee v. Lee*, 2 L. T. Rep. N. S. 532; 6 Jur. N. S. 621.

(m) *Williams v. Ashton*, 1 J. & H. 115.

necessarily applies to those who sustain that character at his death. And (2) the rule is the same where the gift is to the next of kin of a person who is dead at the date of the will,^(a) or who dies before the testator.^(b) (3) If the gift is to the next of kin of a person who survives the testator, the class is ascertained at the death of that person.^(c)

Family.—The word “family” admits of a variety of applications, and the construction to be put upon it in a particular will must depend upon the intention to be collected from the whole context,^(d) and the nature of the property given.

1. In the case of a devise of land, the word family has been held to mean heir. Thus a devise of land to A. and then to his family according to seniority was held to give A. an estate tail.^(e)

2. In the case of a bequest of personalty, or of a mixed fund of realty and personalty, to a person’s family, the primary meaning of the word is children ^(f)

On a bequest to the families of A. and B., the children were held to be entitled exclusively of their parents.^(g) But on a gift to A. and B. for the good of their families, it was held that A. and B. took absolutely as tenants in common.^(h)

An illegitimate child has been held to be included in a gift to a person’s family.⁽ⁱ⁾

Representatives.—The term representatives, or legal representatives, or personal representatives, used in relation to personal property, *prima facie* means executors or administrators.^(k) But in cases where an intention is indicated that the donees shall take beneficially and not in a fiduciary character, the term has generally been applied to next of kin; especially where such words as “share and share alike” or “unto and amongst” are joined to representatives; as such words could not apply to executors. As where the direction was to pay a share unto, between, and amongst all the children of H. living at her death and the “representatives”

(a) *Jarm. Wills*, 981, 5th edit.; *Philps v. Evans*, 4 De G. & S. 188; *Warton v. Barker*, 4 K. & J. 483, 502; but see *Re Rees*, 44 Ch. Div. 484.

(b) *Vaux v. Henderson*, 1 Jac. & W. 388; and see *Re Philps*, L. R. 7 Eq. 151.

(c) *Gundry v. Pinniger*, 1 De G. M. & G. 502; *Smith v. Palmer*, 7 Hare 225.

(d) *Blackwell v. Bull*, 1 Keen 176; 5 L. J. 251, Ch.

(e) *Lucas v. Goldsmid*, 29 Beav. 657; 30 L. J. 935, Ch.; 4 L. T. Rep. N. S. 632; 9 W. R. 759.

(f) *Re Terry*, 19 Beav. 580; *Burt v. Hellyar*, L. R. 14 Eq. 160; 41 L. J. 430, Ch.; 26 L. T. Rep. N. S. 833; *Pigg v. Clark*, 3 Ch. Div. 672; 45 L. J. 849, Ch.; 24 W. R. 1014.

(g) *Barnes v. Patch*, 8 Ves. 604.

(h) *Alexander v. Alexander*, 6 De G. M. & G. 593; 5 W. R. 28.

(i) *Lambe v. Eames*, 6 Ch. App. 597; 40 L. J. 447, Ch.; 25 L. T. Rep. N. S. 175; 19 W. R. 659.

(k) *Re Wyndham’s Trusts*, L. R. 1 Eq. 290; *Re Henderson*, 28 Beav. 656; *Re Turner*, 2 Dr. & Sm. 501; 12 L. T. Rep. N. S. 695; *Re Ware*, 63 L. T. Rep. N. S. 52; 59 L. J. 717, Ch.; 88 W. R. 767; 45 Ch. Div. 269.

of such of them as should have died in her lifetime; for in such a case the next of kin, and not the executors of those deceased, will take.(a)

A similar construction applies where the bequest, in case of the legatee's death, is to go to his "legal representatives."(b)

In a case where the ultimate limitation was "to the *next* personal representatives," the words were held to mean nearest of kin and not statutory next of kin.(c)

Executors.—A gift to A., and in case of his death to his executors or administrators, means death in the testator's lifetime, and on this event happening, the property will go to A.'s executors.(d)

A gift to the executors of A., who predeceases the testator, is a gift to A.'s legal personal representatives as part of his estate.(e)

Whether a gift of residue to executors is for their own benefit or not does not depend on the stat. 1 Will. 4, c. 40, which provides that when a testator appoints executors of his will they are to be deemed to be trustees of the undisposed of residue for the persons who would be entitled under the statute of distributions, unless it appears by the will that the executors were to take for their own benefit.

The above statute has no application when there is an express gift of residue to executors; but whether they take beneficially or as executors or trustees is a question of intention to be ascertained from the will itself. Thus where a testator appointed his "friend G. A." his executor, and in a subsequent part of the will gave him, by name, certain real estate and the residuary personalty, it was held by the House of Lords that G. A. took beneficially.(f)

On the other hand, where a testator gave the whole of his estate to his executors, charged with certain legacies, and in a subsequent part of his will there was an indemnity clause and a direction that the executors should reimburse themselves their expenses, it was held the executors took as trustees for the next of kin.(g)

When a testator gives to his executors, describing them as such, a legacy, the presumption is that it is given to them in that character for their trouble, and it is on them to show something in the nature of the

(a) See *Re Gryl's Trust*, L. R. 6 Eq. 589; *Re Horner*, 37 Ch. Div. 695; 57 L. J. 211, Ch.; 58 L. T. Rep. N. S. 103; *King v. Cleaveland*, 4 De G. & J. 477.

(b) *Bridge v. Abbott*, 3 Bro. C. C. 224; *Briggs v. Upton*, 7 Ch. App. 376; *King v. Cleaveland*, sup.

(c) *Stockdale v. Nicholson*, L. R. 4 Eq. 359; 36 L. J. 793, Ch.; 15 W. R. 986.

(d) *Long v. Watkinson*, 17 Beav. 471; 21 L. J. 844; *Clay v. Clay*, 54 L. J. 648, Ch.; *Re Valdes*, 40 Ch. Div. 159; 58 L. J. 861, Ch.; 60 L. T. Rep. N. S. 42; 37 W. R. 162.

(e) *Trethewy v. Helyar*, 4 Ch. Div. 53; 46 L. J. 125, Ch.

(f) *Williams v. Arkle*, L. R. 7 H. L. Cas. 606; 45 L. J. 590, Ch.; 33 L. T. Rep. N. S. 187; 24 W. R. 215.

(g) *Saltmarsh v. Barrett*, 4 L. T. Rep. N. S. 690; 3 De G. F. and J. 279; see also *Hayes and Jarm. Conc. Wills*, 212, 11th edit.; *Theob. Wills*, 292, 4th edit., for other examples.

legacy or other circumstances arising on the will, or otherwise to rebut that presumption.(a)

The mere fact that the gift of the legacy precedes the appointment of the legatee as executor, or that the legacies to several persons appointed executors differ either in amount or subject-matter, is not enough by itself to rebut the presumption.(b)

However, the above presumption may be rebutted (1) by showing that the legacy was not given to the legatee simply in the character of executor; thus, where a testator appointed Y. and his "friend" P. executors, and gave P. a legacy as a "remembrance," it was held that he was entitled to the legacy though he never proved the will.(c)

(2) So where a legacy to a person named executor was given in remainder after a life interest, this was held to rebut the above presumption, and the person took the legacy though he renounced the executorship.(d)

(3) It has also been held that the presumption does not arise where the gift to executors is of the residue.(e)

Executors as a Word of Limitation.—The class of cases as to representatives and executors before considered must be distinguished from those in which the words "executors and administrators" or "legal representatives" are used as words of limitation; for a bequest to A. and his executors or administrators, or to A. and his legal representatives, will vest the absolute interest in A.;(f) and do not import next of kin,(g) or that the executors are to take any beneficial interest.

Heirs.—(1) As to realty: The word heir when unexplained and uncontrolled by the context is interpreted according to its strict and technical import, that is, as designating the person or persons appointed by law to succeed to the real estate in case of intestacy. Therefore, where a testator devises realty simply to his heir, or to his heir-at-law, or his right heirs, the devise will apply to the person or persons answering this description at his death.(h)

If the devise is contained in a will made or republished since 1838, a devise to the heir will confer on such person an estate in fee simple.(i) And if land be devised by a testator, who dies after 1838, to his heir, the heir takes as devisee and not by descent.(k)

And where freehold lands and gavelkind lands were devised by the

(a) Will. Exors. 1147, 9th edit.; *Re Appleton*, 29 Ch. Div. 893; 54 L. J. 954, Ch.; 52 L. T. Rep. N. S. 906, C. A.

(b) *Re Appleton*, sup.

(c) *Bubb v. Yelverton*, L. R. 13 Ch. Div. 131; 20 W. R. 164.

(d) *Re Reeve*, 4 Ch. Div. 841; 46 L. J. 412, Ch.; 36 L. T. Rep. N. S. 906.

(e) *Christian v. Devereux*, 12 Sim. 264.

(f) *Appleton v. Rowley*, L. R. 8 Eq. 139, 145; 38 L. J. 689, Ch.; 20 L. T. Rep. N. S. 600; *Alger v. Parrott*, L. R. 3 Eq. 328.

(g) *Taylor v. Beverley*, 1 Coll. 108; 13 L. J. 240, Ch.

(h) Jarm. Wills, 905, 5th edit.; and see *Smith v. Butcher*, 10 Ch. Div. 113; 48 L. J. 136, Ch.; *Re Amos*, (1891) 3 Ch. 159; 60 L. J. 570, Ch.; 65 L. T. Rep. N. S. 69; 39 W. R. 550.

(i) 1 Vict. c. 26, s. 28.

(k) 3 & 4 Will. 4, c. 106, s. 3.

same will to the testator's heir, it was held that the gavelkind lands as well as the freehold lands passed to the testator's common law heir.(a)

Prior to the 1 Vict. c. 26, s. 28, a devise to the *heirs of the body* of a particular ancestor, without any estate of freehold being limited to him, was regarded as a limitation of an estate tail, devolving (until barred) on all who successively answer the description of heir of the body of the ancestor.(b) And this appears to be still law; however there seems to be no reported decision where the rule has been applied to a will made after the above statute.(c)

(2) As to personalty: A bequest of personalty to the heir or heirs of a person is, *prima facie*, to be read literally, and goes to the heir of such person, and not to his next of kin.(d) The same rule applies when the gift is of a mixed fund of realty and personalty.(e)

But where the bequest is to heirs, by way of substitution for the legatee, the next of kin will generally take. As where the legacy was to "A. and failing him by decease before me to his heirs," and as A. died before the testator, it was held his statutory next of kin took the legacy.(f)

Quantity of Interest.—Words of Limitation.

We now come to speak of the quantity of interest a devisee or legatee may take in the subject-matter devised or bequeathed to him.

Estate in fee simple.—And first as to real estate: Prior to sect. 28 of 1 Vict. c. 26, it was established that although in wills strict words of limitation were not necessary to pass a fee, yet the testator must, by some other expression in his will, have shown his intention to confer the fee upon the devisee. Consequently, the mere devise of land to A., without more, gave A. an estate for his life only.(g) However, such informal expression as to "A. in fee simple," or to "A. and his assigns for ever," were held to pass the fee to A., but not such words as to "A. and his assigns" simply; or to A. and his successors.(h)

So the word "estate," or "property," or "inheritance," used in the operative part of the devise was sufficient to pass the whole of the testator's interest in the property devised.(i)

(a) *Thorp v. Owen*, 2 Sm. & G. 90; 23 L. J. 286, Ch.; and see *Garland v. Beverley*, 9 Ch. Div. 213; 47 L. J. 213, Ch.; 38 L. T. Rep. N. S. 911; 26 W. R. 718.

(b) See *Mandeville's Case*, Co. Lit. 26, b.; *Vernon v. Wright*, 7 H. L. Cas. 35; 28 L. J. 198, Ch.; *Allgood v. Blake*, L. R. 7 Ex. 339; 8 *Id.*, 160.

(c) See *Jarm. Wills*, 906, n. 5th edit.

(d) *Re Rootes*, 1 Dr. & S. 228; 29 L. J. 868, Ch.; *Southgate v. Clinch*, 27 L. J. 651, Ch.; *Smith v. Butcher*, sup.

(e) *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

(f) *Vaus v. Henderson*, 1 Jac. & W. 388; and see *Gittings v. McDermott*, 2 My. & K. 69; 2 L. J. 212, Ch.; *Re Newton*, L. R. 4 Eq. 171; 37 L. J. 23, Ch.

(g) *Jarm. Wills*, 1181, 5th edit.; *Hill v. Brown*, (1894) A. C. 125; 63 L. J. 46, P. C.; 70 L. T. Rep. N. S. 175.

(h) *Jarm. Wills*, 1183, 5th edit.

(i) *Jarm. Wills*, 1134, 1135, 5th edit.; *Hill v. Brown*, sup.

And a fee simple was held to pass by an indefinite devise, which was followed by a gift over in the event of the devisee dying under twenty-one, or other specified age; as the gift over denoted that the prior devisee was to have the fee in the alternative event of his attaining the age in question.(a)

Although the foregoing cases arise upon the construction of wills made before 1 Vict. c. 26, s. 28, it must be remembered that the Act only applies to wills *made* or republished after its operation (sect. 34). Therefore, if a will be made shortly before January 1, 1838, and the testator does not die for some years after that period, the old law applies, and might have to be considered in investigating a title.

Now by 1 Vict. c. 26, s. 28, where any real estate is devised without words of limitation, such devise passes the fee simple, or other the whole estate or interest which the testator had power to dispose of by his will in such real estate, unless a contrary intention appears by the will.

This section applies to the devise of an existing estate or interest, and not to an estate or interest which the testator by his *will creates de novo*; therefore a gift by will of an annuity without words of limitation is a gift for life only, even if it is charged on real estate.(b)

A contrary intention is not shown by the fact that the will contains one devise without words of limitation, and another devise with words of limitation.(c) But when the same property is devised to one person indefinitely, followed by a devise to another person and his heirs, the first interest is one for life, and the remainder is an estate in fee.(d)

Estate Tail.—In a limitation by deed the words “heirs of the body” were, prior to the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). sect. 51,(e) necessary to pass a fee tail; but in a will these strict words of limitation are not and never were necessary where, by the will, an intention is shown to create an estate descendible to lineal heirs. Thus a devise to A. and his heirs male,(f) or to A. and his heirs lawfully begotten, gives A. an estate tail.(g)

So with regard to realty, the word “issue” may be used as a word of limitation; and a devise to A. and his issue gives A. an estate tail.(h)

The statute *De Donis* does not apply to copyholds; therefore they can only be entailed when there is a custom to that effect. In manors in which there is no custom to entail, a gift of copyhold estate to a man

(a) Jarm. Wills, 1132, 5th edit.; *Andrew v. Andrew*, 1 Ch. Div. 410; 45 L. J. 232; 34 L. T. Rep. N. S. 82; 24 W. R. 349; *Re Harrison's Estate*, 5 Ch. App. 408.

(b) *Nichols v. Hawkes*, 10 Hare, 342; 22 L. J. 255, Ch.; and see *Re Morgan*, (1893) 3 Ch. 222; 62 L. J. 789, Ch.; 69 L. T. Rep. N. S. 407.

(c) *Wisden v. Wisden*, 2 Sm. & Gif. 396.

(d) *Gravenor v. Watkins*, L. R. 6 C. P. 500.

(e) See *ante*, p. 135.

(f) *Baker v. Wall*, 1 Ld. Raym. 185; *Crumpe v. Crumpe*, 69 L. J. 7, P. C.; (1900) A. C. 127.

(g) *Nanfan v. Legh*, 7 Taunt. 85.

(h) *Martin v. Swannell*, 2 Beav. 249; *Beaver v. Nowell*, 25 Beav. 551.

and the heirs of his body will give him an estate analogous to a fee simple conditional, which a freeholder would have acquired under such a gift before the passing of the statute *De Donis*.(a)

Rule in Shelly's Case.—Not only may an estate tail be created by a direct devise to A. and the heirs of his body, but it is also a rule of law, and not of construction, that where an estate of freehold is limited to a person and by the *same* instrument an ulterior estate, either mediately or immediately, is limited to his heirs, or the heirs of his body, the word heirs is a word of limitation and not of purchase. Therefore, if an estate be devised to A. for life, and after his death to the heirs of his body, A. takes an estate tail, and not an estate for life with a remainder to the heirs of his body. And if the devise be to A. for life and after his death to his heirs, he takes an estate in fee simple.(b)

The limitations must, however, be either both legal or both equitable, for if the one be legal and the other equitable the rule does not apply.(c)

So the two limitations must be by the same instrument, but a will and a codicil are considered as one instrument for the purpose of this rule.(d)

The principle of the rule applies to limitations of copyholds.(e)

So the rule will apply where the ancestor takes the freehold by implication of law.(f)

And the word "heir," in the singular, may operate as a word of limitation; as where the devise was to A. for life, remainder to his next heir male, and in default of such heir to remain. Here A. was held to take an estate tail.(g) But words of limitation superadded to the word heir make it a word of purchase, as will be shown subsequently.

And the rule in *Shelly's Case* applies where words of limitation are superadded to the limitation to the heirs or heirs of the body in the plural, provided they are not inconsistent with the nature of the descent pointed out by the first words.(h) As where the devise was to A. for life and after his death to the heirs of his body and their heirs, executors, and assigns for ever, and it was held that A. nevertheless took an estate tail.(i)

Where the words "heirs of the body" are, however, accompanied by an explanatory context, showing that the testator used them in some

(a) *Scriv. Cop.* 44, 45, 7th edit.; *Will. R. P.* 411, 16th edit.

(b) *Shelly's Case*, 1 *Rep.* 93; 1 *Fearne, Cont. Rem.* 29, 89, 181, 10th edit.; *Sm. Ex. Int.* 206; *Van Grutten v. Foxwell*, (1897) *A. C.* 658; 66 *L. J.* 745, *Q. B.*; 77 *L. T. Rep. N. S.* 170.

(c) *Fearne, Cont. Rem.* 52, 10th edit.; *Van Grutten v. Foxwell*, *sup.*

(d) *Hayes d. Foorde v. Foorde*, 2 *W. Bl.* 698; *Jarm. Wills*, 1179, 5th edit.

(e) *Scriv. Cop.* 103, 161, 176, 7th edit.

(f) *Fearne, Cont. Rem.* 40, 10th edit.

(g) *Jarm. Wills*, 1171, 5th edit.; *Fuller v. Chamier*, *L. R.* 2 *Eq.* 682.

(h) *Fearne, Cont. Rem.* 180, 182, 10th edit.

(i) *Kinch v. Ward*, 2 *Sim. & S.* 409; 4 *L. J.* 28, *Ch.*; *Minshull v. Minshull*, 1 *Atk.* 413; *Anderson v. Anderson*, 30 *Beav.* 209; 4 *L. T. Rep. N. S.* 198.

other than their ordinary sense, the rule in *Shelly's Case* does not apply; as when the devise was to B. and his heirs lawfully begotten, "that is to say, the first, second, and other sons," &c., when it was held that B. took an estate for life only.(a)

Archer's Case.—An exception to the rule in *Shelly's Case* was also established by *Archer's Case*,(b) where under a devise to A. for life, with remainder to the heir male of A. and the heirs male of the body of such heir male, it was held that A. took an estate for life with a contingent remainder to the heir male of his body as a purchaser. For the testator having engrafted a limitation over to heirs in the plural on the devise to the heir in the singular, is to be considered as indicating an intention to use the term "heir" as a mere *descriptio personæ*, and the words "heir male" become words of purchase.

Issue.—We have already stated the meaning of this word when used as *persona designata*.(c) When applied to realty, following a devise to the parent for life, *primâ facie*, it means the same as heirs of the body, and becomes a word of limitation. Thus on a devise to A. for life, remainder to his issue, A. takes an estate tail, under the rule in *Shelly's Case*.(d)

But this *primâ facie* meaning of the word issue will give way if there be on the face of the will sufficient to show that the word was intended by the testator to have a less extended meaning. And it is said that it requires a less demonstrative context to show such an intention than when the words "heirs of the body" are used.(e)

Wild's Case.—The word "children" may in some cases become a word of limitation, as in *Wild's Case*, where it was held that on a devise to A. and his children, A. having no children at the time of the devise he took an estate tail; for if he has no issue at the time, it is clear they cannot take as immediate devisees, yet the testator has shown an intention that they should take; therefore the word "children" becomes a word of limitation.(f) And for the purpose of the rule a child *en ventre* at the date of the will is considered as non-existent.(g)

On the other hand, if A. has children at the time of the devise, he and his children usually take jointly.(h)

And the rule in *Wild's Case* is not inflexible, and will not be applied

(a) *Lowe v. Davies*, 2 Ld. Raym. 1561.

(b) 1 Co. Rep. 66; *Willis v. Hiscox*, 4 My. & K. 197; *Fearne*, Cont. Rem. 180, 317, 10th edit.; and see *Fuller v. Chamier*, L. R. 2 Eq. 682, where *Archer's Case* is distinguished.

(c) *Ante*, p. 542.

(d) 1 Jarm. Wills, 1184, 1257, 5th edit.; *Griffiths v. Evans*, 5 Beav. 241; *Roddy v. Fitzgerald*, 6 H. L. Cas. 872.

(e) See and compare *Lees v. Mosley*, 1 Y. & C. Ex. 589; *Roddy v. Fitzgerald*, 6 H. L. Cas. 882; *Slater v. Dangerfield*, 15 M. & W. 263, 272; *Bradley v. Cartwright*, L. R. 2 C. P. 511.

(f) 6 Co. Rep. 16 b.; L. C. C. 669, 3rd edit.; *Clifford v. Koe*, 5 App. Cas. 447.

(g) *Roper v. Roper*, L. R. 3 C. P. 32.

(h) *Byng v. Byng*, 10 H. L. Cas. 178; *Grieve v. Grieve*, L. R. 4 Eq. 180; 36 L. J. 932, Ch.; 16 L. T. Rep. N. S. 201.

where its application would defeat the testator's manifest intention, as shown by the will.(a)

And the rule does not apply to personalty.(b)

Die without Issue, &c.—The words "die without issue," or "die without having issue," or "in default of issue," occurring in wills made before 1838, unexplained by the context, and whether applied to real or to personal estate, are construed to import a general *indefinite* failure of issue, that is, a failure at any time. Therefore, in case of a gift of realty and personalty to A., and if he dies without issue, then over, A. would take an estate tail in the realty and the absolute interest in the personalty.(c)

In regard to *personal* estate, however, an exception was engrafted on the rule where the words were die without *leaving* issue, which was held to import a failure of issue at the *death*; therefore, a bequest to A., and if he dies without *leaving* issue, then over to C., A. was held to take only an interest in the legacy defeasible on his leaving no issue at his death, in which event the limitation over to C. would take effect.(d) There are certain other exceptions to the general rule, both as to realty and personalty, but as they will now seldom occur in practice, the reader is referred to Jarman on Wills, p. 1324, *et seq.*, 5th edit., and to Theobald on Wills, p. 576, *et seq.*, 4th edit.

Now the 1 Vict. c. 26, s. 29, enacts that in any devise of real or bequest of personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or words which import a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of issue, is to be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of issue, unless a contrary intention appears by the will by reason of such person having a prior estate tail, or a preceding gift, not implied from such words, of an estate tail to such person or issue, or otherwise.

The section does not apply where the limitation is to "heirs of the body," as it only deals with "issue."(e) But it applies to the case of a gift over on death without "male issue;" therefore where lands were devised to A., his heirs and assigns, with a gift over if A. should die without leaving any male issue, it was held that A. took an estate in fee simple subject to an executory devise over.(f)

The section does not apply to cases in which the words "dying without issue" are combined with "under twenty-one."(g)

(a) *Grieve v. Grieve*, *sup.*

(b) *Audsley v. Horn*, 26 Beav. 195; 1 L. T. Rep. N. S. 317; 8 W. R. 150.

(c) *Jarm. Wills*, 1320, 1321, 5th edit.; *Cole v. Goble*, 13 C. B. 445.

(d) *Forth v. Chapman*, 1 P. W. 663; *Jarm. Wills*, 1324, 5th edit.

(e) *Green v. Green*, 3 De G. & Sm. 480; 18 L. J. 465, Ch.; *Dawson v. Small*, 9 Ch. App. 651.

(f) *Re Edwards*, (1894) 3 Ch. 644; 64 L. J. 179, Ch.; 43 W. R. 169.

(g) *Morris v. Morris*, 17 Beav. 198; 1 W. R. 377.

In connection with this subject must be read sect. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which provides that where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or not, that executory limitation is to be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect (sub-sect. 1).

This, however, is only to apply where the executory limitation is contained in an instrument operating after 31st December, 1882 (sub-sect. 2).

This enactment may apply to deeds as well as to wills, but its operation will be confined chiefly to the latter, as the word "issue" is spoken of in the section.

The event in which the estate is to go over, it will be observed, is the failure of all or any of the issue of the person entitled; and the limitation over is void as soon as any of the issue attain twenty-one.

Bequests of Personalty with Words of Limitation.—It has already been stated that the effect of a bequest of personalty to A. and his executors or legal representatives is to vest the absolute interest in A.; the additional words being merely words of limitation.(a) And a bequest of stock, the interest of which is to be paid to A. for life, and after A.'s decease such stock to be transferred to A.'s personal representatives, gives A. an absolute interest.(b)

It is also a general rule that if personalty, including leaseholds for years, is bequeathed in words which create an estate tail in realty, as to A. and the heirs of his body, it gives the absolute interest to A. in such personalty.(c)

But if, having regard to the whole will, there is an intention manifested that the heirs of the body are not to take successively, then the first taker will not take absolutely; as where personalty was given in trust for A. for life, and after her death in trust for the heirs of the body of A., first for their education, and then to pay to them the residue at their respective ages of twenty-one in such proportions as A. might appoint. And it was held on the construction of the will that A. only took an estate for life, and that after her death her statutory next of kin took the unappointed residue.(d)

Although it seems that a bequest of personalty to A. and his issue will give A. an absolute interest therein,(e) yet a bequest to A. for life and

(a) *Ante*, p. 546.

(b) *Alger v. Parrott*, L. R. 3 Eq. 328; *Re Bogle*, 78 L. T. Rep. N. S. 457.

(c) *Leventhorpe v. Ashbie*, Tud. L. C. C. 861, 3rd edit.; and see *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, 280; 35 L. J. 622, Ch.

(d) *Re Jeaffreson's Trusts*, sup.; and see other examples, *Theob. Wills*, 392, 4th edit.

(e) See the cases collected and discussed *Jarm. Wills*, 1371, 5th edit.; *Theob. Wills*, 392, 393, 4th edit.

after his death to his issue, which in the case of a devise of realty would create an estate tail,(a) will, in the case of personalty, only give A. an estate for life, and the issue take by purchase.(b)

Gifts of the Income of Property.—It has already been shown that a devise of the rents and profits of land passes the fee therein;(c) so generally a gift of the income of a fund carries the absolute interest in the *corpus*, when the *corpus* is not otherwise disposed of, unless there are in the will sufficient words to cut down the gift to a life interest.(d)

Gifts of Annuities.—We have before stated that, notwithstanding sect. 28 of 1 Vict. c. 26, the bequest of an annuity without words of limitation, is a gift for life only, even if charged on real estate, as the section does not apply to an interest which a testator creates by his will.(e)

If, however, the annuity is given so as to amount to the gift of the income of a particular fund, or where the testator directs that the *corpus* of his property, or a portion thereof, is to be applied in providing for the annuity without any indication as to the duration of such annuity, it will be perpetual.(f)

The gift of an annual sum for maintenance and education of children is not, it seems, limited to their minority, but continues during their lives.(g)

It is sometimes a question in gifts of annuities, whether in case the fund to provide for their payment becomes inadequate for the purpose, the *corpus* is to be applicable to make good the deficiency. The following rules apply:—

1. If an annuity is plainly charged upon the *corpus* of an estate by the will;(h) or if after the gift of an annuity the testator directs the setting apart of a sum of money to secure it, the *corpus* is applicable to make good any deficiency.(i) And the court has power, when an annuity is so charged on the *corpus* of real estate, to order that any arrears shall be raised by a sale or mortgage of the estate; but the making of such an order is in the discretion of the court.(k)

2. If, however, there is anything in the will to show that the *corpus*

(a) *Ante*, p. 549.

(b) *Knight v. Ellis*, 2 Bro. C. C. 570; *Ex parte Wynch*, 5 De G. M. & G. 188.

(c) *Ante*, p. 521.

(d) *Bent v. Cullen*, 6 Ch. App. 235; *Coward v. Larkman*, 57 L. T. Rep. N. S. 285; 60 L. T. Rep. N. S. 1, H. L.

(e) See *ante*, p. 548.

(f) *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576; 22 L. J. 355, Ch.; *Bent v. Cullen*, 6 Ch. App. 235; *Hicks v. Ross*, L. R. 14 Eq. 141; 41 L. J. 677, Ch.

(g) *Soames v. Martin*, 10 Sim. 287; *Wilkins v. Jodrell*, 13 Ch. Div. 564; and see *Re Booth*, (1894) 2 Ch. 282; 63 L. J. 560, Ch.; but see *Gardner v. Barber*, 18 Jur. 508.

(h) *Picard v. Mitchell*, 14 Beav. 103; *Pearson v. Helliwell*, L. R. 18 Eq. 411; 31 L. T. Rep. N. S. 159; 22 W. R. 839.

(i) *May v. Bennet*, 1 Russ. 370; *Carmichael v. Gee*, 5 App. Cas. 588; 49 L. J. 829, Ch.; 29 W. R. 293.

(k) *Re Tucker*, (1893) 2 Ch. 323; 62 L. J. 442, Ch.; 69 L. T. Rep. N. S. 85; *May v. Bennet*, sup.; *Brayne v. Reeds*, 15 L. T. Rep. N. S. 349.

is considered as entire after the death of the annuitant; as if the annuity is payable out of the income of the whole estate, which is to be conveyed by the trustees of the will to others after the annuitant's death;(a) or where a sum out of a residue is directed to be invested to secure an annuity to A., and after the death of A. such sum and residue are to be divided amongst others, the *corpus* is not liable to make good any arrears.(b)

An annuity given to A. and his heirs out of personalty is personal estate, but it will nevertheless devolve like real estate.(c)

A direction to executors to purchase an annuity for A. of a specified amount entitles A. to demand the sum which would have to be expended in the purchase;(d) and if he dies before the purchase is made, his personal representatives are generally entitled to receive the amount.(e) And this right cannot be negated by express declaration in the will that the annuitant shall not be entitled to receive the value; for if the annuity were purchased, he might sell it immediately afterwards.(f) Where, therefore, an annuity is given for life, there should also be inserted in the will a clause that if the annuitant should assign, charge, or incumber the annuity it should cease and form part of the residue, which it seems is effectual.(g) The annuity should, however, be purchased in the name of the trustees;(h) for if the testator directs that the annuity is to be purchased in the name of the annuitant himself, the restraint on alienation has been held to be repugnant and void.(i)

It seems that if an annuity be given with a direction to set apart (not purchase) a sum to secure it, the annuitant is not entitled to have the value of the annuity paid to him.(k)

If no time of payment is fixed by the will, an annuity commences from the day of the testator's death, and the first payment is to be made at the end of twelve months from the death. If it is directed to be paid monthly, the first payment must be made at the end of a month from the testator's death.(l)

It seems that if a sum of money is bequeathed to executors to buy an annuity for A., it is regarded as a trust legacy, and as such carries interest only from twelve months after the date of the testator's death.(m)

(a) *Foster v. Smith*, 1 Ph. 629; 15 L. J. 183, Ch.

(b) *Baker v. Baker*, 6 H. L. Cas. 616; 27 L. J. 417, Ch.; *Michell v. Wilton*, L. R. 20 Eq. 269; 44 L. J. 490, Ch.; 23 W. R. 789.

(c) *Stafford (Earl of) v. Buckley*, 2 Ves. 179; *Radburn v. Jervis*, 3 Beav. 450; and see *Parsons v. Parsons*, L. R. 8 Eq. 260.

(d) *Barnes v. Rowley*, 3 Ves. 305.

(e) *Dawson v. Hearn*, 1 Rus. & M. 606; *Re Mabbett*; *Pitman v. Holborow*, (1891) 1 Ch. 707; 64 L. T. Rep. N. S. 447; 60 L. J. 279, Ch.; 39 W. R. 537.

(f) *Stokes v. Cheek*, 28 Beav. 620; 29 L. J. 922, Ch.

(g) *Hatton v. May*, 3 Ch. Div. 148; 24 W. R. 754; and see *Re Draper*, 57 L. J. 942, Ch.; but see *Day v. Day*, 1 Dr. 569.

(h) *Hatton v. May*, sup.

(i) *Hunt-Foulston v. Furber*, 3 Ch. Div. 285.

(k) See Theob. Wills, 412, 4th edit.; *Wright v. Callendar*, 2 De G. M. & G. 652.

(l) *Houghton v. Franklin*, 1 S. & S. 392; Will. Exors. 1242, and n. 9th edit.

(m) *Re Friend*, 78 L. T. Rep. N. S. 222.

By 33 & 34 Vict. c. 35, after August 1st, 1870, annuities are, like interest on money lent, to be considered as accruing from day to day, and are to be apportionable in respect to time (sect. 2), unless it is expressly stipulated that no apportionment shall take place (sect. 7).

The Act clearly applies to a will made before and confirmed by a codicil executed after its passing; and it seems to all wills.(a)

Absolute Interests cut down.—Where a gift is made in terms to a person absolutely it can be reduced to a limited estate or interest only by clear words cutting down the first estate or interest.(b)

Therefore, under a gift by A. to his wife of 10,000*l.*, and “afterwards to go to the understated residuary legatee,” it was held that as the wife took by the gift an absolute interest, it was not cut down by the subsequent words “afterwards to go,” &c.(c) And in another case where the residuary personalty was given to the widow absolutely, and in a subsequent clause the testator gave “all the money (if any) that should be remaining after payment of his wife’s debts” to certain legatees, it was held that these words were repugnant to the previous absolute gift.(d)

However, it is a question of construction of each particular instrument, and it clearly appears that the testator’s intention was that the absolute interest previously given should, by a subsequent clause, be cut down to a life estate that will be carried out.(e)

Estate of Trustees.

Prior to the operation of 1 Vict. c. 26, from the want of acquaintance by testators with the Statute of Uses (27 Hen. 8, c. 10) great difficulty frequently arose in determining the nature and extent of the estates of trustees under wills.(f)

Now, however, by 1 Vict. c. 26, s. 30, where any real estate (other than a presentation to a church) is devised to any trustee or executor, such devise is to be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable or an estate of freehold is thereby given to him expressly or by implication.

And by sect. 31, that where any real estate is devised to a trustee without any express limitation of the estate to be taken by him, and the beneficial interest therein, or in the surplus rents and profits thereof, is not given to any person for life, or is given to any person for life, but the

(a) *Constable v. Constable*, 11 Ch. Div. 681; 48 L. J. 621, Ch.; 40 L. T. Rep. N. S. 516; and see *Re Cline’s Estate*, L. R. 18 Eq. 213; *et ante*, p. 328.

(b) *Re Jones; Richards v. Jones*, (1898) 1 Ch. 438; 67 L. J. 211, Ch.; 78 L. T. Rep. N. S. 74; 46 W. R. 313.

(c) *Re Percy*, 24 Ch. Div. 616; 53 L. J. 143, Ch.; 49 L. T. Rep. N. S. 554.

(d) *Perry v. Merritt*, L. R. 18 Eq. 152; 43 L. J. 608, Ch.; 22 W. R. 600; *Re Jones*, *sup.*

(e) *Constable v. Bull*, 3 De G. & S. 411; 18 L. J. 302, Ch.; 22 *Id.*, 182; *Ribbens v. Potter*, 10 Ch. Div. 733; *Re Pounder*, 56 L. J. 113, Ch.; 56 L. T. Rep. N. S. 104.

(f) Will. R. P. 219, 13th edit.

purposes of the trust may continue beyond the life of such person, such devise is to be construed to vest in the trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied.

These sections are admitted to be obscure in their effect. In *Freme v. Clement*, Jessel, M.R., said that probably sect. 31 was another drafting of sect. 30, though both remain in the Act.(a) The result seems to be that trustees, whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee.(b)

The case of a devise to trustees in trust to pay the rents and profits to A. for life and after his death in trust for B. and his heirs, remains unaltered; and the legal estate will be in the trustees until the death of A., and then it will vest in B.(c) So a devise to the use of A. in trust for B. gives A. the legal estate, if not by force of the Statute of Uses, at least in analogy to it. But a direct devise to A. to the use of B. will vest the legal estate in B.(d)

Real Representative.—And now, as already shown(e) by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), where real estate (not being copyhold or customary freehold requiring admittance, &c.), is vested in any person without a right in any other person to take by survivorship, it will on his death, after the commencement of the Act (1st January, 1898), notwithstanding any testamentary disposition, devolve to and become vested in his personal representative as if it were a chattel real. This includes realty over which a person executes by will a general power of appointment (sect. 1). But subject as in the Act mentioned such personal representative is to hold the real estate as a trustee for the persons beneficially entitled thereto (sect. 2), as already fully shown, *ante*, pp. 29, 30.

It follows from sect. 1 of the Act that in the case of a will appointing an executor or executors, he or they would, if the testator dies after the commencement of the Act, become his real representative or representatives, notwithstanding any other appointment by the will.

Copyholds.—Where a testator is entitled to copyholds and wishes them to be sold after his death, he should, instead of devising them to trustees to sell, insert in the will a mere power for his trustees to appoint the copyholds; such trustees might be the same persons as the real representatives. By so doing, the admittance of the trustees and the fine attendant thereon will be avoided. This mode, however, is only applicable where the copyholds are to be sold immediately after the testator's death.(f)

Precatory Words.—A question sometimes arises on the construction of a will whether a gift is beneficial or only in trust, and this is especially so where the testator has used what are called precatory words, that is,

(a) 18 Ch. Div. 499, 514.

(b) Jarm. Wills, 1166, 5th edit.

(c) Hayes & Jarm. Conc. Wills, 68, 69, 11th edit.

(d) Jarm. Wills, 1137, 1139, 5th edit.; Theob. Wills, 358, 4th edit.

(e) *Ante*, p. 29, *et seq.*

(f) See *ante*, p. 379.

words of request, recommendation, entreaty, or desire, addressed to the devisee or legatee. In order to create such a trust (1) the object and subject of the supposed trust must be certain or definite, and (2) it must appear from the whole will that it was the intention of the testator to create a trust.(a)

The tendency of modern decisions is to restrict rather than extend the doctrine of precatory trusts. Formerly in many cases down to that of *Le Marchant v. Le Marchant*(b) slight words of recommendation were held to create a trust. In that case the testator gave to his wife all his property "for her sole use and benefit in the full confidence that she will so bestow it on her decease to my children in a just and equitable spirit, and in such manner and way as she feels would meet with my approval." And it was held that the widow took a life interest with a power of appointment amongst the children. In the case of *Lamb v. Eames*,(c) however, where, after the gift to the wife, the property was "to be at her disposal in any way she may think best for the benefit of herself and family," it was held these words did not raise a trust.

In a later case where a testator gave all his real and personal estate unto the absolute use of his wife, her heirs, &c., "in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by her will," it was held by the Court of Appeal that the widow took an absolute interest in the property unfettered by any trust.(d)

So where a testatrix gave legacies to her two nieces for their separate use and added "I wish them to bequeath the same equally between the families of O. and P.," and it was held that the nieces took absolutely, unfettered by any trust. And Lopes, L.J., said "the current of decisions with regard to precatory trusts is now changed, and the court will not allow a precatory trust to be raised unless on consideration of all the words employed it comes to the conclusion that it was the intention of the testator to create a trust."(e)

The previous decisions, therefore, on this subject down to *Le Marchant v. Le Marchant*(f) must be received with great caution.

Of Legacies.

Legacies may be either (1) general; (2) specific; or (3) demonstrative. A general legacy is a gift not of any particular thing, but of something to

(a) See Story's Eq. ss. 1068, a., 1070; Jarm. Wills, 356, 5th edit.; *Harding v. Glyn*, 2 L. C. Eq. 335, *et seq.*, 7th edit., and cases cited *infra*.

(b) L. R. 18 Eq. 415; 22 W. R. 839.

(c) L. R. 10 Eq. 267; 6 Ch. App. 597; 40 L. J. 447, Ch.; 25 L. T. Rep. N. S. 175; 19 W. R. 659; *Hutchinson v. Tenant*, 8 Ch. Div. 540; 26 W. R. 904.

(d) *Re Adams and Kensington Vestry*, 27 Ch. Div. 394, 406; 51 L. T. Rep. N. S. 382; 54 L. J. 87, Ch.; 32 W. R. 883; see also *Missorie Bank v. Raynor*, 7 App. Cas. 321, 330.

(e) *Re Hamilton*, (1895) 2 Ch. 370, 374; 64 L. J. 799, Ch.; 72 L. T. Rep. N. S. 748; 43 W. R. 577.

(f) *Supra*.

be provided out of the testator's general estate. A specific legacy is a gift of a severed or specified part of the testator's property. Thus the bequest of 100*l.*, or of 100*l.* railway stock, without referring to any particular stock to which the testator may be entitled, is a general legacy. So the bequest of *a* diamond ring is a general legacy, and will be satisfied with the delivery of any diamond ring; but a bequest of "*the* diamond ring presented me by A." is a specific legacy, and can only be satisfied by the delivery of the particular ring. So a bequest of "1000*l.* Consols now standing in my name at the Bank of England," is a specific legacy.(a) There is this further difference between them: a general legacy not being a gift of a specified part of the testator's personal estate, cannot be lost by ademption, as a specific legacy may, which, being a gift of a specified part of the testator's property, cannot pass to the legatee unless the specific chattel be in the testator's possession at his death. On the other hand, specific legacies have priority over general legacies in the administration of assets, and do not abate for payment of debts until the general legacies are wholly exhausted.(b)

A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus a bequest of "50*l.* sterling to be paid out of the sum of 100*l.* Consols now standing in my name at the Bank of England," is a demonstrative legacy; so is a bequest of "100*l.* out of my Midland Railway stock." A demonstrative legacy partakes partly of the nature of a specific legacy and partly of the nature of a general legacy. Thus, like a specific legacy, it is not liable to abate for the payment of debts until the general legacies have been wholly applied for such purpose; and like a general legacy it is not liable to ademption; for it is considered that the testator intended the legatee to have the legacy at all events, and, if possible, that it should be paid out of the fund named.(c)

However, it seems there is a distinction between a bequest of *stock* out of stock, and *money* out of stock. A legacy of stock out of specific stock has been held to be specific, being the gift of a part of a specified fund. Thus, where a testatrix bequeathed "4000*l.* capital stock in the 3 per cent. Consols, or in whatever of the Government funds the same shall be found invested," it was held to be a specific legacy.(d) But, as before stated, a gift of *money* out of stock is a demonstrative legacy.(e)

A mere enumeration of specific things, as "all my household furniture, implements of trade, cattle, sheep, and all the rest of my personal estate not hereinbefore disposed of" is not specific, it is residuary.(f)

(a) Will. Exors. 1019, *et seq.*, 9th edit.; *Bothamley v. Sherson*, L. R. 20 Eq. 305; 44 L. J. 589, Ch.

(b) Will. Exors. 1020, 1183, 9th edit.

(c) Will. Per. Pro. 401, 402, 11th edit.; Will. Exors. 1021, 1027, 9th edit.; *Mullins v. Smith*, 1 Dr. & S. 204; 8 W. R. 739.

(d) *Hosking v. Nicholls*, 1 Y. & Col. C. C. 478; 11 L. J. 230, Ch.; *Mullins v. Smith*, *sup.*

(e) *Dean v. Test*, 9 Ves. 146; Theob. Wills, 114, 4th edit.; and see *Davies v. Fowler*, L. R. 16 Eq. 308, 312.

(f) *Taylor v. Taylor*, 6 Sim. 646; *Fielding v. Preston*, 1 De G. & J. 438.

Cumulative and Substitutional Legacies.—Sometimes a testator gives more than one legacy to the same person, and a question then arises whether the second legacy is intended as a substitute for the one previously given, or as cumulative.

1. Where there is no internal evidence of the testator's intention the following rules appear established :

(A.) Where two legacies of *equal* amount are given to the same legatee by the *same* instrument, the second bequest is considered a mere repetition, and the legatee takes one legacy only.(a) But if the two legacies are of unequal amount, the legatee is entitled to both.(b)

(B.) Where two legacies, whether of equal or unequal amount, are given *simpliciter* to the same legatee by *different* instruments, the presumption is that the latter legacy is cumulative.(c)

(C.) If the same *specific thing* is bequeathed twice to the same legatee, it is one legacy, for it is clear it cannot be given more than once.(d)

2. Where there is internal evidence of the testator's intention, however, that must be regarded. Thus, although two legacies of *equal* amount are given by the different instruments, but a *motive* for the gift is expressed, and in both instruments the motive is the *same*, this double coincidence alters the rule and raises the presumption that the second gift was only a repetition of the former one.(e)

And where a testator gave two legacies of 500*l.* each to the same person by two codicils executed at the same time, and in nearly the same words, and comprising no other legacy, it was held that the two legacies were substitutional and not cumulative.(f)

The preceding cases clearly show the necessity of expressly stating in the will or codicil whether the subsequent gift is to be in addition to or in substitution for the preceding gift.

Ademption.—As already stated, a specific legacy is liable to ademption. If the thing bequeathed does not at the testator's death remain in *specie*, as described in the will, it is considered as revoked by ademption. Thus, if the legacy be of a particular gold chain, it is adeemed not only by the testator's parting with it in his lifetime, but also if he should change its form as by converting it into a cup.(g)

So when where a testator bequeathed certain chattels to A., and then insured them against loss by sea, and then took them with him on a

(a) *Garth v. Meyrick*, 1 Bro. C. C. 30 ; *Manning v. Thesiger*, 3 My. & K. 29 ; 4 L. J. 285, Ch.

(b) *Curry v. Pile*, 2 Bro. C. C. 225 ; Will. Exors. 1156, 9th edit.

(c) *Hooley v. Hatton*, 1 Bro. C. C. 390 ; *Hurst v. Beach*, 5 Mad. 358 ; *Wilson v. O'Leary*, L. R. 12 Eq. 525 ; 7 Ch. App. 448.

(d) See Will. Exors. 1156, 9th edit.

(e) *Hurst v. Beach*, sup. ; Will. Exors. 1157, 1158, 9th edit.

(f) *Whyte v. Whyte*, L. R. 17 Eq. 50 ; 43 L. J. 104, Ch. ; 22 W. R. 180.

(g) *Ashburner v. Macguire*, 2 Bro. C. C. 108 ; 1 L. C. Eq. 780, 7th edit. ; Will. Exors. 1183, 9th edit.

voyage, and the chattels and the testator perished by wreck together, it was held that A. had no right to the insurance money.(a)

And a bequest of "1000l. stock of the London and North-Western Railway, standing in the names of my trustees," which was paid off by the company and re-invested in the testator's lifetime in shares of the Lancashire and Yorkshire Railway Company, was held thereby to be adeemed.(b) But a mere change or conversion by a company of its shares into stock will not cause an ademption of a specific legacy of shares in the company, for it is substantially the same.(c)

So a debt due to the testator which is specifically bequeathed, as a bond debt or a mortgage debt, is adeemed wholly by the testator's receipt of the debt, or *pro tanto*, by receipt of part of such debt.(d)

Exoneration of Specific Legacies.—If a specific legacy is pledged or charged by the testator, the specific legatee is (save as stated *infra*) entitled to have his legacy redeemed or exonerated by the executor; or, if the property is not redeemed, to have compensation out of the testator's general assets to the amount of the legacy.(e)

But charges upon the legacy—not in strictness incumbrances but something incidental to the nature of the thing, as the rent of leaseholds specifically bequeathed becoming due after the testator's death—must be discharged by the legatee.(f) And as already shown,(g) mortgaged lands are now by 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, liable for the payment of any mortgage debt thereon, unless a contrary intention is shown, and the heir or devisee is not entitled to have the mortgage debt paid out of the personal or other estate of the mortgagor; and by 40 & 41 Vict. c. 34, the Acts are extended to lands of any tenure and to a legatee, and therefore leaseholds are brought within their provisions as to any testator or intestate dying after 31st December, 1877.

As to Rents, Profits, and Income.

A present devise of lands being specific,(h) carries the rents and profits from the date of the testator's death.(i) But a future devise of lands alone which does not take effect until the happening of some contingency, does not carry with it the intermediate rents, but the same, if undisposed of, belong to the heir-at-law,(k) or to the residuary devisee, if one.(l)

(a) *Durrant v. Friend*, 5 De G. & S. 343.

(b) *Harrison v. Jackson*, 7 Ch. Div. 339; 47 L. J. 142, Ch.

(c) *Oakes v. Oakes*, 9 Hare 666; *Re Pilkington*, 13 L. T. Rep. N. S. 35.

(d) *Ashburner v. Macguire*, sup.; *Re Bridle*, 4 C. P. Div. 336.

(e) *Bothamley v. Sherson*, L. R. 20 Eq. 304; 44 L. J. 589, Ch.; 23 W. R. 848; *Will. Exors.* 1646, 9th edit.

(f) *Bothamley v. Sherson*, sup., at p. 316; *Hickling v. Bowyer*, 3 M. & G. 635; 21 L. J. 388, Ch.; and see *post*.

(g) *Ante*, p. 240.

(h) See *ante*, p. 521.

(i) *Theob. Wills*, 143, 4th edit.; *Hayes and Jarm. Conc. Wills*, 239, 11th edit.

(k) *Bective (Earl) v. Hodgson*, 10 H. L. Cas 656; 10 L. T. Rep. N. S. 202; 12 W. R. 625.

(l) *Re Eddels*, L. R. 11 Eq. 559; 40 L. J. 316, Ch.; 24 L. T. Rep. N. S. 223.

A specific bequest as of stock or shares, if vested, carries all the income and profits which may accrue upon it from the testator's death.(a)

By 33 & 34 Vict. c. 35, all rents,(b) annuities,(c) dividends, and other periodical payments in the nature of income are to be considered as accruing from day to day, and to be apportionable in respect of time (sect. 2). Dividends include payments made in the name of dividend, bonus, or otherwise out of the revenues of public companies, whether made or declared at fixed times or otherwise, but not payments in the nature of a return of capital (sect. 5). The Act does not apply to policies of assurance (sect. 6); nor to any case where it is expressly stipulated that no apportionment shall take place (sect. 7).

The Act clearly applies to a will made before, and confirmed by a codicil executed after, the Act; and it seems to the will of a testator dying before the Act.(d)

The Act also applies to a specific legacy carrying interest.(e)

Where a testator bequeathed shares in a company upon trust for A. for life, remainder to B., and declared that every share bequeathed should carry the dividend accruing thereon at his death, it was held that this was an express stipulation within sect. 7 that no apportionment should take place, and that the accruing dividend should be treated as income and not as capital.(f)

Interest on general legacies.—The period from which a general legacy carries interest varies according to certain circumstances. In the case of a general legacy of money or stock, and no time of payment is fixed by the testator, the legacy is payable at the end of a year from the testator's death, and if not then paid it carries interest from that period; and the first payment of interest is not due until the end of two years from the testator's death; and if the legacy be given to the testator's wife it makes no difference,(g) not even if given in satisfaction of her dower.(h)

So in the case of a gift of a pecuniary legacy to one for life, remainder over, the rule is the same, and interest runs only from the expiration of a year from the testator's death.(i) But it seems otherwise as to such a bequest of the residue.(k)

(a) *Clive v. Clive*, Kay 600; 23 L. J. 981, Ch.; and see *Maclaren v. Stainton*, 30 L. J. 723, Ch.; 4 L. T. Rep. N. S. 715.

(b) See *ante*, p. 328.

(c) See *ante*, p. 553.

(d) *Constable v. Constable*, 11 Ch. Div. 681; 48 L. J. 621, Ch.; 40 L. T. Rep. N. S. 516; see *Re Cline's Estate*, L. R. 18 Eq. 213; *Lawrence v. Lawrence*, 26 Ch. Div. 795, *ante*, p. 328.

(e) *Pollock v. Pollock*, L. R. 18 Eq., 329; 44 L. J. 168, Ch.; 22 W. R. 726; where Malins, V.C. explains his judgment in *Whitehead v. Whitehead*, L. R. 16 Eq. 528.

(f) *Re Lysaght*, (1898) 1 Ch. 115; 67 L. J. 65, Ch.; 77 L. T. Rep. 637, C. A.

(g) *Re Whitaker*, 21 Ch. Div. 657; 51 L. J. 737, Ch.; 46 L. T. Rep. N. S. 802; 30 W. R. 787.

(h) *Re Bignold*, 45 Ch. Div. 496; 59 L. J. 737, Ch.; 63 L. T. Rep. N. S. 542; 39 W. R. 184.

(i) Will. Exors. 1243, 9th edit.; Theob. Wills, 149, 4th edit.; and see *Re Whitaker*, *sup.*

(k) Will. *sup.*; *et post.*

When legacies are payable out of a reversionary fund interest does not begin to run till the reversion falls into possession.(a)

There are, however, several exceptions to the rule above stated, and interest begins to run from the testator's death in the following cases:

1. Where a legacy is charged upon land only;(b) but this does not generally apply when the legacy is payable out of the *proceeds* of the sale of real estate.(c)

2. Where a legacy is given to an infant by a parent, or by one *in loco parentis*, interest runs from the testator's death, for the child's maintenance;(d) even if the legacy be contingent,(e) or the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of *residue* given to him equally with other children.(f) But, generally, if the testator has provided some *other* fund (not being a residue) for maintenance, the above rule does not apply.(g)

If the infant is *en ventre* at the testator's death, interest runs from its birth.(h)

In connection with this subject must be read sect. 43 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which provides that where any property is held by trustees for an infant for life or for any greater interest, and whether absolutely or contingently, on his attaining twenty-one, &c., the trustees may, at their discretion, pay to the infant's parent or guardian, if any, or otherwise apply for the infant's maintenance, education, or benefit, the income of the property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance, &c.

The above section only applies to a case where apart from it the infant would be entitled to interest on his legacy.(i) And see some further decisions on this section *ante*, p. 420.

Where a future time is fixed by the testator for payment of a legacy, it carries interest only from the time fixed;(k) except where the legacy is given by a parent or person *in loco parentis*, as already(l) stated; or where the legacy is given to an infant, and the executors are empowered

(a) *Earle v. Bellingham*, 24 Beav. 448; 27 L. J. 545, Ch.

(b) *Spurway v. Glynn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393.

(c) *Turner v. Buck*, L. R. 18 Eq. 301; 43 L. J. 583, Ch.; 22 W. R. 748; but see *Re Waters*, 42 Ch. Div. 517.

(d) *Wilson v. Maddison*, 2 Y. & Col. C. C. 372; 12 L. J. 420, Ch.

(e) *Donovan v. Needham*, 9 Beav. 164; *Re George*, 5 Ch. Div. 837, 843; but see *Re Inman*, (1898) 3 Ch. 518; 62 L. J. 940; 42 W. R. 156.

(f) *Re Moody*, (1895) 1 Ch. 101; 64 L. J. 174, Ch.; 72 L. T. Rep. N. S. 190; 43 W. R. 462.

(g) *Re George*, *sup.*; *Re Moody*, *sup.*

(h) *Rawlins v. Rawlins*, 2 Cox 425.

(i) *Re Judkins*, 25 Ch. Div. 743; 53 L. J. 496, Ch.; 50 L. T. Rep. N. S. 200; 32 W. R. 407; *Re Dickson*, 29 Ch. Div. 331; 54 L. J. 510, Ch.; 52 L. T. Rep. N. S. 707; 33 W. R. 511; *Re Inman*, *sup.*

(k) *Lloyd v. Williams*, 2 Atk. 108; *Lord v. Lord*, 2 Ch. App. 782.

(l) *Supra.*

to apply the income thereof for the infant's maintenance, &c., in which case interest runs from the death of the testator, although he did not stand *in loco parentis* to the infant.(a)

Satisfaction and Ademption.

Satisfaction.—The gift by will of a legacy may satisfy a prior liability to give or pay. Thus when a parent or person *in loco parentis* has covenanted to pay a portion to a child, and afterwards gives that child a legacy of equal or greater amount, the legacy is presumed to be a satisfaction of the portion;(b) and if the legacy is of less amount it is a satisfaction *pro tanto*;(c) for equity leans against double portions.(d)

The presumption of satisfaction will not be rebutted by slight differences between the covenant and the legacy.(e) For instance, the fact that the limitations in the instrument containing the covenant to settle are not identical with those of the will, as where the husband takes the first life estate under the covenant, and the wife under the will, does not displace the rule.(f) Nor does the fact that the gift by will is a share of the residue.(g) Where the legacy is held to be a satisfaction of the covenant, the party may elect under which instrument he will take.(h)

But as the question of satisfaction is one of intention, great differences in the limitations in the two instruments of the trusts on which the sums are given will be taken as an indication that the gift in the will was not meant to be in satisfaction of the covenant.(i)

And a direction in the will to pay the testator's debts is a material circumstance, and, coupled with other circumstances, may rebut the presumption against double portions.(k)

As the presumption against double portions is raised by law the court will receive evidence of declarations by the testator to rebut such presumption; for such evidence only tends to prove the testator meant what is expressed in the will and not to disprove it.(l)

The doctrine of satisfaction may also apply to a legacy to a creditor. When a debtor bequeaths to his creditor a pecuniary legacy equal to or greater than the amount of the debt, it is presumed to be a satisfaction of the debt.(m)

Equity, however, leans against the satisfaction of a *debt* by a legacy.

(a) *Re Richards*, L. R. 8 Eq. 119. (b) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

(c) *Warren v. Warren*, 1 Bro. C. C. 305.

(d) *Thynne v. Glengall*, 2 H. L. Cas. 131, 154.

(e) *Hinchcliffe v. Hinchcliffe*, sup.

(f) *Russell v. St. Aubyn*, 2 Ch. Div. 398; 46 L. J. 641, Ch.; 35 L. T. Rep. N. S. 395

(g) *Thynne v. Glengall*, sup.

(h) *Re Tussaud's Estate*, 9 Ch. Div. 363; *Chichester v. Coventry*, L. R. 2 H. L. Cas. 71, 91; 11 L. T. Rep. N. S. 171; 17 *Id.*, 535.

(i) *Chichester v. Coventry*, sup.

(k) *Chichester v. Coventry*, sup.; *Paget v. Grenfell*, L. R. 6 Eq. 7; 37 L. J. 833, Ch.

(l) *Re Tussaud's Estate*, 9 Ch. Div. 363; Tay. Ev. 805, 9th edit.

(m) *Talbot v. Shrewsbury*, 2 L. C. Eq. 378, 6th edit.

Therefore (1) if the legacy be of less amount than the debt it is not a satisfaction even *pro tanto*; nor (2) if the gift is of the residue.(a) So (3) if the debt be not existing at the date of the will the legacy is no satisfaction.(b) And (4) satisfaction is rebutted by the thing given being different to the debt, as where the gift is of land.(c) Also (5) if the legacy is less advantageous than the debt, as if the debt is payable one month after the testator's death, and the legacy not until six months thereafter.(d) Nor (6) does the doctrine of satisfaction apply to a debt due upon a negotiable security, which may have been transferred by the creditor;(e) nor (7) where the will contains a direction to pay debts and legacies,(f) or it seems a direction to pay debts only.(g)

Ademption.—We have already(h) referred to the ademption of specific legacies. And where a testator bequeaths a pecuniary legacy to his child, or to a person to whom he has placed himself *in loco parentis*, and afterwards in his lifetime gives the same child or person a sum of money or stock, the advancement will be a satisfaction or ademption of the legacy, wholly or *pro tanto*, according to the amount advanced; for the legacy was presumed to be given as a portion.(i) This doctrine also now applies where the gift by will is of the residue, especially if that appears to have been the intention.(k) And a bequest of residue has been held to be satisfied by a gift by the testator in his lifetime of a share in a business.(l) But small sums doled out by the testator at different times do not amount to an ademption.(m) Where the testator is neither parent nor *in loco parentis* to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement; unless the legacy is given for a *particular* purpose, and the testator advances money for the *same* purpose;(n) or unless the intention otherwise legally appear of making the advancement with a view to ademption.(o)

Documents or entries made by the testator are admissible as to the amount of the advances made.(p)

(a) *Thynne v. Glengall*, 2 H. L. Cas. 131; *Devese v. Pontet*, 1 Cox 188.

(b) *Thomas v. Bennett*, 2 P. W. 343.

(c) *Eastwood v. Vinks*, 2 P. W. 614.

(d) *Haynes v. Mico*, 1 Bro. C. C. 129.

(e) *Carr v. Eastabrooke*, 3 Ves. 561.

(f) *Chancey's Case*, 1 P. W. 408; 2 L. C. Eq. 376, 7th edit.

(g) *Re Huish*, 43 Ch. Div. 260; 59 L. J. 135, Ch.; 62 L. T. Rep. N. S. 52; 38 W. R. 199.

(h) *Ante*, p. 559.

(i) *Ex parte Pye*, 18 Ves. 140; 2 L. C. Eq. 366, 7th edit.; *Leighton v. Leighton*, L. R. 18 Eq. 458; 43 L. J. 594, Ch.; 22 W. R. 727.

(k) *Montefiore v. Gudella*, 1 De G. F. & J. 93; 1 L. T. Rep. N. S. 251.

(l) *Re Vickers*, 37 Ch. Div. 525; 57 L. J. 738, Ch.; 58 L. T. Rep. N. S. 920.

(m) *Watson v. Watson*, 33 Beav. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236.

(n) Will. Exors. 1199, 9th edit.; *Re Pollock*, 28 Ch. Div. 552, 556; 54 L. J. 489, Ch.; 52 L. T. Rep. N. S. 718.

(o) Will. sup.; *Pankhurst v. Howell*, 6 Ch. App. 136; 19 W. R. 312.

(p) *Whateley v. Spooner*, 3 K. & J. 542; but see *Smith v. Conder*, 9 Ch. Div. 170.

Life Interests and Remainders.

Life Interests.—Property real or personal may as a rule be limited by will to one person for life with remainder to another; the ulterior limitation in the case of personalty being termed an executory bequest.(a)

In some cases, however, the nature of the property does not permit of a gift over. Thus the gift of a life interest in wines and other consumable stores vests the absolute interest therein in the legatee.(b) But this rule does not apply where the gift is of the stock-in-trade of a wine merchant,(c) or of farming stock, or other consumable articles forming part of the stock-in-trade of a business; for there is a distinction between the gift of consumable articles in a private house, and those forming part of the stock-in-trade of a business.(d)

As to a gift of an absolute interest being cut down to a life interest, see *ante*, p. 555.

As already shown(e) a direction that a life interest shall not be alienated is inoperative; but a provision for cesser of a life interest, or gift over upon the life tenant's bankruptcy or alienation, is good.(f)

And certain restrictions may be imposed on a life estate in realty; thus it may be given with or without impeachment of waste, as already(g) detailed.

Emblements.—We have already shown(h) of what emblements consist, and how the law thereon applies between landlord and tenant. As between the remainderman and the executor or administrator of the tenant for life, the latter is, on the tenant for life's death, entitled to the emblements. And he has a right of entry, egress, and regress to cut and carry them away.(i) But if the tenant for life did not sow the land, as if it was sown by his predecessor, his personal representative, on his death, is not entitled to the crop.(k)

Fixtures.—It seems the personal representative of the tenant for life would have at least the same privilege of removing fixtures against the remainderman or reversioner that the personal representative of the deceased owner in fee has against the heir.(l) And it is said that it cannot, upon authority, be affirmed of any specific article that it is removable as between tenant and landlord,(m) but that it is *not* removable as between tenant for life and remainderman.(n)

(a) Will. Exors. 1253, n. 9th edit.

(b) *Randall v. Russell*, 3 Mer. 194.

(c) *Phillips v. Beal*, 32 Beav. 25.

(d) *Cockayne v. Harrison*, L. R. 13 Eq. 432; 26 L. T. Rep. N. S. 385; 20 W. R. 504.

(e) See *ante*, p. 479.

(f) *Hurst v. Hurst*, 21 Ch. Div. 278; 51 L. J. 729, Ch.; 46 L. T. Rep. N. S. 899; 31 W. R. 327; *et ante*, p. 479.

(g) *Ante*, p. 416.

(h) *Ante*, p. 368.

(i) Co. Lit. 55; Will. Exors. 628, 632, 9th edit.

(k) Will. Exors. 629, 9th edit.

(l) See *Amos. & Fer. Fix.* 174, 3rd edit.

(m) See *ante*, p. 366.

(n) *Amos. & Fer. Fix.* 175, 3rd edit.; see also *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; 36 L. J. 107, Ch.; 15 W. R. 186; *Hill (Viscount) v. Bullock*, (1897) 2 Ch. 482; 66 L. J. 705, Ch.; 77 L. T. Rep. N. S. 240; 46 W. R. 84.

Dividend and Bonus.—Sometimes when stock or shares in a company are given to one for life with remainder over, and a bonus is declared thereon, it becomes a question to whom it belongs. This depends upon whether the company, having the power of distributing its profits as dividend or of converting them into capital, has taken the former or the latter course. For, in such case, what is paid by the company as *dividend* goes to the tenant for life, and what is paid as capital, or appropriated as an increase of capital in the company, enures to the benefit of all who are interested in the capital, according to the will.(a)

Burdens.—A tenant for life is, as a rule, bound to keep down the interest on incumbrances upon the estate falling due while he is in possession to the extent of the income he receives; but he is not bound to pay arrears of interest accrued due before his possession.(b) And the tenant for life is not, it seems, personally liable to the mortgagee for such interest.(c) So where several incumbered estates are devised to him together as an aggregate whole he must apply the aggregate income in keeping down the aggregate annual charges in respect of the incumbrances. He cannot accept the beneficial portion of the property and refuse the onerous part.(d)

A tenant for life of freehold property is not bound to keep the buildings in repair without some obligation to that effect.(e)

But where leaseholds for years are bequeathed to a person for life, and then over, it is not free from doubt as to how far the tenant for life is liable to keep the property in repair and bear the ordinary outgoings. In *Re Courtier*(f) leaseholds were given to two trustees, one of whom was the testator's wife, upon trust for her for life, and after her death upon trust for sale, and the proceeds were given over. There was also power given to sell certain short leaseholds during the widow's life. The leaseholds were in a bad state of repair at the testator's death, and the widow kept them in the same state of repair; and the remainderman asked the court to compel the widow, who had become sole trustee, to put them into proper repair or to sell the short leaseholds; but the Court of Appeal declined to interfere. This decision was followed by Kekewich, J. in *Re Baring*.(g)

In a later case where a testator directed his trustees to pay the income to be derived from certain leaseholds for years to his wife for life, and after her death for his children, Stirling, J. held that "income to be

(a) *Bouch v. Sproule*, 12 App. Cas. 385, 397; 57 L. T. Rep. N. S. 345; 56 L. J. 1037, Ch.; 36 W. R. 193.

(b) *Sharshaw v. Gibbs*, 1 Kay 333; 23 L. J. 451, Ch.

(c) *Re Morley*, L. R. 8 Eq. 594; *Syer v. Gladstone*, 30 Ch. Div. 614; 34 W. R. 565.

(d) *Frewen v. Law Life Assurance Co.*, (1896) 2 Ch. 511; 75 L. T. Rep. N. S. 17; 65 L. J. 787, Ch.; 44 W. R. 682.

(e) See *ante*, p. 333.

(f) 34 Ch. Div. 136; 55 L. T. Rep. N. S. 574; 56 L. J. 350, Ch.

(g) (1893) 1 Ch. 61; 62 L. J. 50, Ch.; 67 L. T. Rep. N. S. 702; 41 W. R. 87.

derived" meant after deducting all proper outgoings, and consequently ground rent, rates, taxes, insurance, and other outgoings must be borne by the tenant for life.(a)

And in a subsequent case where leaseholds for years were bequeathed to one for life, with remainder to another, North, J. held that the tenant for life was during his interest, as between himself and the testator's estate, bound to bear the obligations imposed by the covenants in the lease.(b) And Kekewich J., after taking the opposite view in *Re Baring*,(c) and in *Re Tomlinson*,(d) on having the decision of Stirling, J. and that of North, J. brought to his notice, followed those decisions,(e) departing from his own previous decisions already cited.

It will be noticed that in *Re Courtier*(f) the claim was by the remainderman against the tenant for life, but that in *Re Betty*,(g) and in *Re Gjers*,(g) the claim was between the tenant for life and the testator's estate.

And recently it has been held by North, J., on a bequest of leasehold houses held under a lease containing a covenant to repair, to one for life with remainder over, that the remainderman could not recover against the estate of the deceased tenant for life for non-repair of the premises; distinguishing the liability of the tenant for life as between the remainderman and the testator's estate respectively.(h)

On a bequest of leaseholds for years subject to the usual covenants, to one for life with remainder over, it would be advisable, therefore, to state by the will by whom the liabilities are to be borne.

Conversion of Residue.—Where a residue is given to one for life with remainder over to another, and any part thereof is of a wasting or hazardous nature, as leaseholds, the property must be sold and converted or put into authorised investments so that it may be enjoyed by both, unless upon the whole context of the will it appears that the testator had not that intention.(i)

So the tenant for life is entitled to have reversionary property converted and invested so that he may have enjoyment thereof during his life.(k)

If it appears from the will, however, that the property was not to be converted, then the tenant for life is entitled to the enjoyment of the

(a) *Re Redding*, (1897) 1 Ch. 876; 66 L. J. 460, Ch.; 76 L. T. Rep. N. S. 339; 45 W. R. 457.

(b) *Re Betty*, (1899) 1 Ch. 821; 68 L. J. 435, Ch.; 80 L. T. Rep. N. S. 675.

(c) *Supra*.

(d) (1898) 1 Ch. 232; 67 L. J. 97 Ch.; 78 L. T. Rep. N. S. 12; 46 W. R. 299.

(e) *Re Gjers*, (1899) 2 Ch. 54; 68 L. J. 442, Ch.; 80 L. T. Rep. N. S. 689; 47 W. R. 535.

(f) *Supra*.

(g) *Supra*.

(h) *Re Parry and Hopkin*, (1900) 1 Ch. 160; 81 L. T. Rep. N. S. 807.

(i) *Howe v. Earl Dartmouth*, 7 Ves. 137; 1 L. C. Eq. 68, 77, 7th edit.; *Macdonald v. Irvine*, 8 Ch. Div. 101.

(k) *Johnson v. Routh*, 27 L. J. 305, Ch.; 6 W. R. 6; *Harrington v. Atherton*, 3 De G. J. & S. 352; 11 L. T. Rep. N. S. 291.

property in specie.(a) And where short leaseholds were given by a testator to one for life with remainder over, and power was given to his trustees to retain any portions of his property in its then state of investment, or to sell and convert the same at their discretion, it was held that the power to retain existing investments enabled the trustees to retain the short leaseholds.(b)

Where there is no right to specific enjoyment of what is given, the tenant for life is (1) entitled from the testator's death to the income of so much of the property as is invested on authorised securities. And (2) as regards unauthorised securities he is entitled from the testator's death to the income which would have been produced by sale and conversion thereof, and investment in authorised securities at the end of a year from the testator's death. (3) If any part of the property cannot be conveniently converted within the year the tenant for life is entitled to interest thereon from the testator's death at 4 per cent. until conversion and investment on authorised securities.(c)

In order to relieve trustees and executors from the difficulties arising from the foregoing rules every will should expressly state whether the legatee for life is to have the actual income of the whole property until conversion or not.(d)

Where a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert within the year.(e)

Remainders and executory interests.—By a common law conveyance an estate of freehold could not be created to commence *in futuro*, nor could it be limited upon a future event to one person in abridgment or defeasance of an estate in fee first limited to another. But such limitations might effectually be made by a conveyance operating under the Statute of Uses (27 Hen. 8, c. 10), called springing or shifting uses; also by will, termed executory devises.(f) Thus, by way of executory devise lands may be limited to A. and his heirs, but if he should die before he should be married, then to B. and his heirs.(g)

It is said that where an estate can take effect as a contingent remainder it shall not take effect as an executory devise;(h) but it has already been shown that by 40 & 41 Vict. c. 33, a contingent remainder in tenements or hereditaments, created after 2nd August, 1877, which would have been valid as a springing or shifting use or executory devise, had it not had a

(a) *Howe v. Earl Dartmouth*, sup.; *Thursby v. Thursby*, L. R. 19 Eq. 395; 44 L. J. 289, Ch.; 23 W. R. 500; *Re Pitcairn*, (1896) 2 Ch. 199; 65 L. J. 120, Ch.; 73 L. T. Rep. N. S. 430; 44 W. R. 200.

(b) *Gray v. Siggers*, 15 Ch. Div. 74; 49 L. J. 819, Ch.; 29 W. R. 13.

(c) *Brown v. Gellatly*, 2 Ch. App. 751; 17 L. T. Rep. N. S. 131; 15 W. R. 1188; *Wentworth v. Wentworth*, (1900) A. C. 163; 69 L. J. 13 P. C.

(d) See *Hayes & Jarm. Wills*, 265, 11th edit.

(e) *Re Norrington*, 13 Ch. Div. 654; 28 W. R. 711.

(f) See 1 St. C. 383, 384, 426, 13th edit.; *Fearne, Cont. Rem.* 225, 372, 373, 10th edit.

(g) *Fearne, Cont. Rem.* 395, 10th edit.

(h) *Fearne, Cont. Rem.* 386, n. 10th edit.

sufficient estate to support it(a) as a contingent remainder shall, if the particular estate determines before the contingent remainder vests, be capable of taking effect as if it had originally been created as a springing or shifting use or executory devise.

A vested interest which is given over in certain events is divested if those events happen. Thus a bequest to A., and if he shall die unmarried or without children, to B., is an absolute gift to A. defeasible by an executory gift over in the event of A. dying at any time unmarried or without children.(b)

In cases to which sect. 10 of the Conveyancing Act, 1882 (*ante*, p. 552), does not apply, where a gift by will is followed by a gift over on the death of the donee, a question arises to what period the death refers. In *Edwards v. Edwards*,(c) the construction of such gifts was thus stated: (1) On a gift to A., and if he shall die to B.; the contingency has reference to the death of the testator. (2) On a gift to A., and if he shall die without children, to B.; the contingency has reference to the death of A. (3) On a gift to Z. for life with remainder to A., and if he shall die, to B.; or (4) to Z. for life, with remainder to A., and if he shall die without leaving children, to B.; in either case the contingency has reference to death before Z. But the fourth rule was overruled in *O'Mahoney v. Burdett*,(d) and it was held that the gift to A. was defeated by his dying at any time without children.(e)

An executory devise must take effect within the time allowed by the rule against perpetuities, that is, within a life or lives in being and twenty-one years after, with a further period for gestation if it actually exists, otherwise the limitation is void.(f) The rule against perpetuities has already(g) been considered.

This rule is applicable to limitations of personal as well as to limitations of real estate.(h)

The period from which the time allowed by the rule begins to run is, in the case of a will, from the death of the testator, and not from the date of the will.(i)

Legal remainders are also controlled by an analogous doctrine, that no estate by way of remainder can be limited to the unborn child of an unborn person.(k)

(a) See *ante*, p. 539.

(b) *O'Mahoney v. Burdett*, L. R. 7 H. L. Cas. 388; 31 L. T. Rep. N. S. 705; 23 W. R. 361.

(c) 15 Beav. 357; 21 L. J. 324, Ch.

(d) *Supra*.

(e) *O'Mahoney v. Burdett*, *sup.*; *Ingram v. Soutten*, L. R. 7 H. L. Cas. 408; 44 L. J. 55, Ch.; 23 W. R. 363.

(f) *Cadell v. Palmer*, 1 Cl. & F. 372; Tud. L. C. C. 424, 3rd edit.; Jarm. Wills, 214, 5th edit.

(g) *Ante*, p. 423.

(h) See Will. Exors. 1116, 9th edit.; L. C. C. 465, 3rd edit.; *Thomas v. Wilberforce*, 31 Beav. 299.

(i) Tud. L. C. C. 465, 3rd edit.; Theob. Wills, 477, 4th edit.

(k) *Whitby v. Mitchell*, 44 Ch. Div. 85; 59 L. J. 485, Ch.; 62 L. T. Rep. N. S. 771; 38 W. R. 337.

Limitations depending upon a prior limitation which is void for remoteness are themselves invalid.(a) Some further remarks on this subject will be found *ante*, p. 424.

Accumulations.—It has already been stated(b) for what periods the income of real or personal property may, by 39 & 40 Geo. 3, c. 98, as amended by 55 & 56 Vict. c. 58, be accumulated, and what exceptions thereto are allowed.

Where accumulations are directed by a will coming within the Wills Act (1 Vict. c. 26), any void accumulations directed to be made out of real estate (not given as a residue) will fall with the residuary devise, if one, unless a contrary intention appears by the will.(c)

Where personal estate not being the residue is directed to be accumulated, any void accumulations will fall into the residuary bequest, if one.(d)

If the income of a residue is directed to be accumulated, any void accumulations go to the heir-at-law or next of kin, according to whether the property from which the accumulations spring is real(e) or personal.(f)

As to the exceptions allowed by the Act (39 & 40 Geo. 3, c. 98), it has been already stated what are portions;(g) and as to the exception allowed for payment of debts, this not only applies to past debts, but to liabilities which may afterwards accrue.(h)

Estates by Implication.

An estate may sometimes arise by implication; as where a testator devises land to his heir-at-law after the death of A.; in this case A. takes an estate for life by implication; for it is clear by the will that the heir is not meant to take at once, and therefore to carry out that intention A. enjoys the land for his life.(i) But a devise to a *stranger* after the death of A. does not give A. a life estate by implication, for there is nothing to show that the heir was not intended to take until the death of A.(k) And an heir-at-law can only be disinherited by express devise or by necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed.(l)

(a) *Re Abbott; Peacock v. Frigout*, (1893) 1 Ch. 54; 67 L. T. Rep. N. S. 794; 62 L. J. 46, Ch.; 41 W. R. 154.

(b) *Ante*, p. 425.

(c) See *Nettleton v. Stevenson*, 3 De G. & Sm. 366; 18 L. J. 191, Ch.

(d) *Attorney-General v. Poulden*, 3 Hare 555; *Jones v. Maggs*, 9 Hare 605.

(e) *Wildes v. Davis*, 1 Sm. & G. 275; 22 L. J. 495, Ch.

(f) *Mathews v. Keble*, 3 Ch. App. 691.

(g) *Ante*, p. 425.

(h) *Varlo v. Faden*, 1 De G. F. & J. 211; 1 L. T. Rep. N. S. 176.

(i) *Gardner v. Sheldon*, L. C. C. 625, 3rd edit.

(k) *Gardner v. Sheldon*, *sup.*; *Upton v. Ferrers*, 5 Ves. 800.

(l) 1 Jarm. Wills, 498, 5th edit.; *Gardner v. Sheldon*, *sup.*; *Hall v. Warren*, 5 L. T. Rep. N. S. 190; 10 W. R. 66.

And in the case of a devise to the heir-at-law after the death of A., it seems, in order that an estate by implication may arise to A., the heir-at-law must be such at the time of the devise, but the point is not clear.(a) A life estate to A. will not be implied from a gift, after the death of A., to the testator's heir-at-law along with other persons.(b)

Where personal estate is bequeathed by a testator to his next of kin after the death of A., the latter takes an interest therein for life by implication, by analogy to the rule with regard to real property; but not so where the bequest is, after the death of A., to persons who happen to be some only of the next of kin.(c)

And not only may an estate for life arise by implication, but even an absolute interest may so arise. Thus where leaseholds were bequeathed in trust for A. and B. for their use and benefit until A. attained twenty-one, and if A. and B. should die before A. attained twenty-one, then over to others, it was held that A. and B. were absolutely entitled to the leaseholds on A. attaining twenty-one.(d) The same rule has been applied to a devise of real estate.(e)

So in a will cross remainders may be implied; as where there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, with a gift over in default of such issue; the gift over takes effect only in default of the issue of all of them, and therefore cross remainders are implied between the tenants in tail.(f)

Gifts on Conditions.

Conditions are either precedent or subsequent—that is, either the performance of them is made to *precede* the vesting of an estate given, or the non-performance to *determine* an estate antecedently vested.(g)

As regards *real* estate when a condition precedent cannot be performed, whether from its being illegal or otherwise, the devise fails; but if the performance of a condition subsequent becomes impossible, the devise is absolute.(h)

As to a condition imposing residence on a Settled Estate, see *ante*, p. 443.

As regards *personal* property no distinction is as a rule recognised between a precedent and a subsequent condition. Where a condition precedent is impossible, as to drink up the sea, the bequest is absolute, and is discharged from the condition. But if the condition is originally

(a) See Jarm. Wills, 499, 5th edit.

(b) *Ralph v. Carrick*, 11 Ch. Div. 873; 48 L. J. 801, Ch.; 40 L. T. Rep. N. S. 505.

(c) *Re Springfield*, (1894) 3 Ch. 603; 64 L. J. 201, Ch.; *Ralph v. Carrick*, sup.

(d) *Gardiner v. Stevens*, 30 L. J. 199, Ch.; 9 W. R. 138.

(e) *Paylor v. Pegg*, 24 Beav. 105; and see Jarm. Wills, 514, *et seq.*, 5th edit.; Theob. Wills, 607, *et seq.*, 4th edit.

(f) *Powell v. Howells*, L. R. 3 Q. B. 654; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116.

(g) Jarm. Wills, 842, 5th edit., where instances are given.

(h) Jarm. Wills, 849, 850, 852, 5th edit.

possible and becomes impossible by act of God, the gift will not take effect.(a) And there is a difference as to the effect of a condition subsequent not being performed when it is or is not accompanied by a gift over. For if property, real or personal, is given to a person with a condition that he shall do some act, as execute a release, or refrain from doing some act, as marrying a person of a particular religion, and in default the property is given over, such gift over will take effect.(b) But it seems an infant is not bound by such a condition, and therefore the gift over does not, at least during infancy, take effect.(c)

As to a condition in restraint of alienation when annexed to a gift in fee, see *ante*, p. 36.

In connection with this subject it may be added that where a pecuniary legacy is given to a legatee for an object which cannot be carried out, the legatee is usually entitled to the legacy free from the direction.(d)

Conditions in Restraint of Marriage.

A condition in restraint of marriage generally, is void as being against public policy ; but partial restraints are valid. A limitation to a person until marriage is good, as this serves to provide for the person until marriage, and does not prevent such person from marrying.(e)

A condition in restraint of a widow or widower from marrying again is not void.(f) So a condition not to marry without consent is good, but, as a rule, in the case of a bequest of personalty to make effectual such a condition subsequent, there must be a bequest over in default, otherwise the condition will be regarded as *in terrorem* only.(g) But in the case of *real* estate a gift over is not essential to the validity of conditions in partial restraint of marriage.(h) And it seems that a condition precedent not to marry without consent under a given age, annexed to a gift of personalty, is binding without a gift over.(i)

When the marriage is to take place with the consent of the executor, and he dies before consent, it has been held that the condition is void.(k)

(a) See Theob. Wills, 451, 452, 4th edit. ; Jarm. Wills, 852, 853, 5th edit.

(b) *Cleaver v. Spurling*, 2 P. W. 528 ; *Hodgson v. Halford*, 11 Ch. Div. 959 ; 48 L. J. 548, Ch. ; 27 W. R. 545 ; *Wainwright v. Miller*, (1897) 2 Ch. 255 ; 66 L. J. 616, Ch. ; 76 L. T. Rep. N. S. 718 ; 45 W. R. 652.

(c) *Partridge v. Partridge*, (1894) 1 Ch. 351 ; 63 L. J. 122, Ch. ; 70 L. T. Rep. N. S. 261.

(d) *Spence Eq.* 462, 464 ; *Re Bowes*, (1896) 1 Ch. 507 ; 65 L. J. 298, Ch. ; *Will. Exors.* 1154, 9th edit.

(e) *Morley v. Reynoldson*, 2 Hare 570 ; 12 L. J. 372, Ch. ; *Heath v. Lewis*, 3 De G. M. & G. 954 ; 22 L. J. 721, Ch.

(f) *Allen v. Jackson*, 1 Ch. Div. 399 ; 45 L. J. 310, Ch. ; 33 L. T. Rep. N. S. 713 ; 24 W. R. 306.

(g) *Lloyd v. Branton*, 3 Mer. 108 ; Jarm. Wills, 887, 5th edit.

(h) *Haughton v. Haughton*, 1 Moll. 611 ; Jarm. Wills, 887, n., 5th edit.

(i) *Stackpole v. Beaumont*, 3 Ves. 89 ; *Yonge v. Furse*, 8 De G. M. & G. 756.

(k) *Graydon v. Hicks*, 2 Atk. 16 ; *Hayes & Jarm. Conc. Wills*, 372, 11th edit.

However, if this be so, the rule does not apply where the consent is to be given by the guardian of an infant, for if the guardian dies and the infant marries, she is not entitled to the legacy; for a guardian could have been appointed by the court for the purpose of consenting.(a) If the consent of more than one person, as of parents, is required, and one of them dies, the consent of the survivor will be sufficient.(b)

Where a testator does not prescribe any formalities as to the consent, it is sufficient if the consent is substantially given.(c)

Sufficient has been said to show that in framing conditions great care should be exercised, and in particular it should be shown (1) whether the prescribed act is to be in the nature of a condition precedent or subsequent; (2) it should also be stated what period is to be allowed for the performance of the condition; also (3) what is to be the destination of the property in case of non-compliance with the condition; and (4) in the case of a consent to be given, it should, in addition, be stated what is to be the result if compliance with the condition becomes impracticable by death or otherwise.(d)

Onerous Gifts.

Where by a will two *distinct* legacies are bequeathed to the same person, one of them being onerous and the other beneficial, *primâ facie* he may disclaim the onerous legacy and take the other. But this right may be rebutted if there is anything in the will to show that it was the testator's intention that this option should not exist. And if onerous property and beneficial property are included in the *same* gift, *primâ facie* the legatee cannot disclaim the onerous and accept the beneficial; he must take all the property or none of it.(e)

As to a devisee or legatee taking an estate subject to a mortgage or other charge, see *ante*, pp. 240, 566; and as to the right of a specific legatee to have it exonerated from a charge, see *ante*. p. 560.

Vesting.

The law is said to favour the vesting of estates. And as a will takes effect from the testator's death, any devise or bequest in favour of a person *in esse* simply (that is, without any intimation of a desire to postpone its operation), confers an immediately vested interest.(f)

If words of futurity or contingency are introduced into a gift, a question

(a) *Re Brown*, 18 Ch. Div. 61.

(b) *Dawson v. Oliver Massey*, 2 Ch. Div. 753; 45 L. J. 519, Ch.; 24 W. R. 993.

(c) *Re Smith*; *Keeling v. Smith*, 44 Ch. Div. 654; 59 L. J. 284, Ch.; 62 L. T. Rep. N. S. 181; 38 W. R. 380.

(d) See *Hayes & Jarm. Conc. Wills*, 397, 398, 11th edit.

(e) *Guthrie v. Walrond*, 22 Ch. Div. 573; *Re Hotchkys*; *Freke v. Calmady*, 32 Ch. Div. 408; 55 L. J. 546, Ch.; 55 L. T. Rep. N. S. 110; *Frewen v. Law Life Assurance Company*, (1896) 2 Ch. 511; 75 L. T. Rep. N. S. 17; 65 L. J. 787, Ch.; 44 W. R. 682; *et ante*, p. 566.

(f) *Jarm. Wills*, 756, 5th edit.

arises whether the expressions are inserted for the purpose of postponing the vesting, or point merely to deferred possession or enjoyment.(a)

Real estate.—Thus, where real estate was devised to A. for life, and after her decease to B., C., D., and E. (an infant), “provided she lives to attain twenty-one,” and A. died during the minority of E., it was held that E. took a vested share subject to being divested if she died under age.(b)

But each will must be construed according to its context, and where a house was given to E. for life, “and from and after her decease for all her children in equal shares on their respectively attaining twenty-one,” and E. left only one child who survived her mother and died under twenty-one, it was held that the child did not take a vested interest.(c)

Legacies charged on land.—When legacies are charged on real estate, they are, so far as they come out of that estate, to be considered as dispositions *pro tanto* of that species of property.(d) In regard to a legacy payable out of realty *in futuro*, and the time of payment has reference to the *legatee personally*, as in the case of a legacy to A. to be paid to him at twenty-one, and A. dies under twenty-one, the legacy is not raisable.(e)

But if the postponement of payment has reference not to the person of the legatee, but to the *convenience of the estate*, as if lands be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy vests at once, and if C. dies before the day of payment, his representatives will be entitled.(f)

Personal legacies.—The general principles which regulate the vesting of devises of real estate apply to a great extent to gifts of personalty. Whatever difference exists between them has arisen from the application to the latter of doctrines borrowed from the civil law, which have not obtained in regard to real estate.(g)

Where a personal legacy is payable *in futuro*, a leading distinction is that if futurity is annexed to the *substance* of the gift, the vesting is suspended—the legacy being in fact contingent; but if the futurity relates to the time of *payment* only, the legacy vests at once.(h) To illustrate the first proposition. A testator bequeathed the dividends on certain stock to H. for life, and after her decease the principal was given to her children on their attaining twenty-one. H. had one child who died under

(a) Jarm. Wills, 756, 762, 5th edit.; and see *Leadbeater v. Cross*, 2 Q. B. Div. 18.

(b) *Simmonds v. Cock*, 29 Beav. 455; *Andrew v. Andrew*, 1 Ch. Div. 410; 45 L. J. 232, Ch.

(c) *Re Jobson*, 44 Ch. Div. 154; 59 L. J. 245, Ch.; 62 L. T. Rep. N. S. 148: where *Andrew v. Andrew*, sup., is distinguished.

(d) Jarm. Wills, 791, 5th edit.

(e) *Parker v. Hodgson*, 1 Dr. & Sm. 568; 4 L. T. Rep. N. S. 762; Jarm. Wills, 791, 5th edit.

(f) Jarm. Wills, 792, 5th edit.; *Remnant v. Hood*, 2 De G. F. & J. 396; 3 L. T. Rep. N. S. 458; 30 L. J. 71, Ch.

(g) Jarm. Wills, 791, 5th edit.

(h) Jarm. Wills, 794, 5th edit.

twenty-one; and it was held that the child did not take a vested interest in the principal, and the legacy failed.(a)

If, however, there is first a clear gift of the legacy, and it is then directed to be *paid* at the age of twenty-one, or other period, the legacy is vested at once, and if the legatee dies before the time of payment named, it passes to his representative.(b) However, if there is no clear and substantive gift in the first instance, but the only gift is in the direction to pay or divide, the legacy is not vested.(c)

Where a legacy is given to a person in words which, standing alone and unexplained, make it a contingent gift, as where it is given to him *if* or *when* he attains twenty-one, or marries;(d) yet if the income or interest is given to the legatee in the meantime, the gift amounts in substance to an absolute vested legacy.(e) But it seems in order that the legacy may vest, the whole income must be given, for if the trustees have a discretion as to the amount to be applied, the legacy will not vest.(f)

So where a legacy is given on the legatee's attaining a certain age, yet if the legacy is to be at once separated from the rest of the estate and vested in trustees for the benefit of the legatee, though the interest is in the meantime directed to be accumulated and go with the principal, the legacy is vested.(g)

Where, however, an entire fund is given to a class of persons equally (and not a sum to each separately), on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance does not confer a vested interest until the given age is attained.(h)

Substitution.

The term substitution is generally applied to limitations intended to provide for the death of prior legatees before the period of distribution.(i)

Thus, a direct gift to A. or his children goes to A. if he survive the testator, but if he dies in the testator's lifetime, his children take by substitution.(k)

So where the gift is to a class of parents (as children, brothers, or

(a) *Re Wrangham*, 1 Dr. & Sm. 358; 3 L. T. Rep. N. S. 722; 30 L. J. 258, Ch.

(b) *Chaffers v. Abell*, 3 Jur. 578; Jarm. Wills, 795, 5th edit.

(c) *Merry v. Hill*, L. R. 8 Eq. 619; *Locke v. Lamb*, L. R. 4 Eq. 372.

(d) Jarm. Wills, 800, 5th edit.; *Elton v. Elton*, 3 Atk. 504.

(e) *Booth v. Booth*, 4 Ves. 399; *Re Wrey*, 30 Ch. Div. 507; 54 L. J. 1098, Ch.: 53 L. T. Rep. N. S. 334.

(f) *Re Wintle*, (1896) 2 Ch. 711, 718; 65 L. J. 863, Ch.; 75 L. T. Rep. N. S. 207; 45 W. R. 91, where *Fox v. Fox*, L. R. 19 Eq. 286, is criticised.

(g) *Saunders v. Vautier*, Cr. & Ph. 240; *Re Bevan's Trusts*, 34 Ch. Div. 716; 56 L. J. 652, Ch.; 56 L. T. Rep. N. S. 277.

(h) *Re Parker*; *Barker v. Barker*, 16 Ch. Div. 44; *Re Mervin*, (1891) 3 Ch. 197; 60 L. J. 671, Ch.; 65 L. T. Rep. N. S. 186; 39 W. R. 697.

(i) Theob. Wills, 539, 4th edit.

(k) *Penley v. Penley*, 12 Beav. 547; *Finlason v. Tatlock*, L. R. 9 Eq. 258; 39 L. J. 422, Ch.; 22 L. T. Rep. N. S. 3; 18 W. R. 332.

cousins) with a substitutional gift to the children of parents dying before the period of distribution, the children of parents who die after the date of the will, and before the testator, will take.(a)

As a rule, where there is a gift to a *class* with a substitution of the issue of objects who should die before the period of distribution, the issue of a parent dead at the date of the will will not take; for the substituted legatees must point out the original legatees in whose place they demand to stand, which the issue of any legatees who were dead at the date of the will cannot do, as their dead parent could not possibly have taken under the will.(b)

Where, however, the children of a deceased person found their claim not on a mere clause of substitution, but on an independent original gift comprehending them with another class of objects, then the gift will extend to the children of persons dead at the date of the will. Thus, where after a life estate to R. T. the property was given to "all and every his children living at his decease, and the issue of such of them as shall be then dead leaving issue," it was held that the issue of a child who was dead at the date of the will took a share with the surviving children.(c)

And the rule which excludes from a substitutionary gift children of objects dead at the date of the will, does not apply where the original gift is to individual's *nominatim*, and not to a class.(d)

Gifts to Survivors.

The word "survive" and "survivor" usually import that the person who is to survive must be living at the time of the event which he is to survive.(e) It seems that the strict construction generally prevails. In order to warrant the translation of survivor into "other," there must be an intention to that effect in the will.(f)

When there is such an intention the word will yield up its primary meaning and may be construed as "other." As where a residue was given in trust to divide the income equally among the testator's three children during their respective lives, and after the death of each child, as to each share in trust for his or her issue; but if any child should die without leaving issue, his or her share, original or accruing, to be in trust for the

(a) *Re Hotchkiss*, L. R. 8 Eq. 643; 38 L. J. 631, Ch.; *Habergham v. Ridehalgh*, L. R. 9 Eq. 395; 39 L. J. 545, Ch.; 23 L. T. Rep. N. S. 214; 18 W. R. 427; *Theob. Wills*, 541, 4th edit.; but see *Re Hannam*, (1897) 2 Ch. 39; 76 L. T. Rep. N. S. 681, where *Habergham v. Ridehalgh*, sup., is commented on.

(b) *Christopherson v. Naylor*, 1 Mer. 320; *Re Hotchkiss*, sup.; *Re Webster*, 23 Ch. Div. 737; 52 L. J. 767, Ch.; *Re Musther*, 43 Ch. Div. 569; 59 L. J. 296, C. A.; *Jarm. Wills*, 1584, 5th edit.

(c) *Tytherleigh v. Harbin*, 6 Sim. 329; *Adams v. Adams*, L. R. 14 Eq. 246; 27 L. T. Rep. N. S. 505; 20 W. R. 881; *Re Woolrich*, 11 Ch. Div. 663; 48 L. J. 321, Ch.

(d) *Ive v. King*, 16 Beav. 46; 21 L. J. 560, Ch.; *Jarm. Wills*, 1595, 5th edit.

(e) *Gee v. Liddell*, L. R. 2 Eq. 341; 35 L. J. 640, Ch.; 14 W. R. 853.

(f) *Crowder v. Stone*, 3 Rus. 217; 7 L. J. 93, Ch.; *King v. Frost*, 15 App. Cas. 548; *Re Rubbins*, 78 L. T. Rep. N. S. 218; 79 *Id.*, 313, C. A.

survivors or survivor of the children for their, his, or her respective life or lives; and after the decease of such survivor, in trust for his or her issue; with an ultimate gift over in case all the testator's children should die without issue to the representatives of the survivor.

After the testator's death one of his children died without issue, then another died leaving issue, and lastly the third child died without issue. And it was held that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund. For the ultimate gift over showed that it was the testator's intention, if there was any such issue, whether of one child or more, that that issue should become entitled to his property.(a)

But if there is no gift over on the death of all the testator's children without leaving issue, and the share of the tenant for life dying without issue is given to the survivors for their respective lives, and after their deaths to their children, only children of the survivors will take, and children of a tenant for life who died previously will be excluded.(b)

There is a conflict of decisions as to whether "survivor" may be construed as "longest liver."(c)

When Survivors Ascertained.—In gifts to survivors, a further question arises to what period survivorship refers? When survivorship refers to death merely, the rule is (1) if there is no previous interest given in a legacy, then the time at which survivorship is to be ascertained is the death of the testator, and the survivors at his death will take the whole legacy. But (2) if a previous life estate is given, then the time at which survivorship is to be ascertained is the death of the tenant for life, and the survivors at such period will take the whole legacy; thus making survivorship correspond with the period of division.(d) And (3) where there are successive tenants for life, the period of division is the death of the last surviving tenant for life.(e)

The above rules apply to real as well as to personal estate.(f)

The above rules may, however, be excluded by the language of the will.

For further information on this subject the reader is referred to Theobald on Wills, p. 554, *et seq.*, 4th edit., and to Jarman on Wills, p. 1533, *et seq.*, 5th edit.

From what has been said, it will be seen that clauses of accrues should be so framed that the shares of objects dying may go, not merely to

(a) *Wake v. Varah*, 2 Ch. Div. 348; 45 L. J. 533, Ch.; 34 L. T. Rep. N. S. 437; 24 W. R. 621; following *Waite v. Littlewood*, 8 Ch. App. 70; 42 L. J. 216, Ch.; 28 L. T. Rep. N. S. 123; 21 W. R. 131.

(b) *Re Benn*, 29 Ch. Div. 839; 53 L. T. Rep. N. S. 240; 34 W. R. 6, C. A.; but see *Re Bowman*, 41 Ch. Div. 525; 60 L. T. Rep. N. S. 888; 37 W. R. 583.

(c) See *Maden v. Taylor*, 45 L. J. 569, Ch.; *Davidson v. Kimpton*, 18 Ch. Div. 213; *Re Roper*, 41 Ch. Div. 409; *King v. Frost*, sup.; *Ranelagh v. Ranelagh*, 41 W. R. 549; *Askew v. Askew*, 57 L. J. 629, Ch.

(d) *Cripps v. Wolcott*, 4 Mad. 11; Jarm. Wills, 1544, 1548, 5th edit.

(e) *Howard v. Collins*, L. R. 5 Eq. 349; Jarm. 1546.

(f) *Re Gregson*, 2 De G. J. & S. 428; 11 L. T. Rep. N. S. 450.

survivors properly so called, but to the others of the devisees or legatees ; and the accruing as well as the original shares should be expressly included.(a)

General Rules of Construction.

We have already in the course of this chapter(b) mentioned certain rules of construction applied to wills. Other salient rules are the following :

Changing words.—Difficulties often arise from the indiscriminate use by testators of the words “and” and “or.” It seems the courts will read “and” for “or,” and *vice versa*, where it is shown to be necessary for the purpose of correcting a palpable mistake, or of reconciling a contradiction or clear inconsistency, or of otherwise giving effect to a testator’s indisputable intention.(c)

Thus, in the case of a devise of land to A., “but if he dies under twenty-one or without issue,” over to another, “or” will be read “and” if A. attains twenty-one, in order to carry out the intention in favour of the issue of A.(d)

So the word “and” has sometimes been construed as “or,” to favour the vesting of a gift, where such a construction is called for by the context of the will.(e) As where the ultimate bequest, after the failure of certain prior interests, was to the testator’s nephews and nieces *and* such of them as should be then living. And it was held that it was impossible, upon the construction of the will, to read the word “and” otherwise than as “or.”(f)

The ordinary meaning of “either,” is one of two, and not both.(g)

Further information on this subject will be found in Theobald on Wills, p. 570, *et seq.*, 4th edit., and in Jarman on Wills, p. 470, *et seq.*, 5th edit.

Repugnancy in Wills.—Another rule of construction is, that where clauses or gifts are irreconcilable, so that they cannot possibly stand together, that clause or gift which comes last shall prevail, the subsequent words being construed to denote a change of intention on the testator’s part.(h)

But this rule is subject in its application to the doctrine that the testator’s intention is to be gathered from the general tenor of the whole will, and is not applied until the failure of every attempt to give to the

(a) See Hayes & Jarm. Wills, 268, 274, 276, 11th edit.

(b) As to the primary rule of Construction, see *ante*, p. 497. And as to the admission of parol evidence, see *ante*, p. 533.

(c) Hayes & Jarm. Wills, 299, 11th edit.

(d) *Fairfield v. Morgan*, 2 B. & P. N. R. 38 ; *Denn v. Kemys*, 9 East, 366 ; see also *Wingfield v. Wingfield*, 9 Ch. Div. 658.

(e) Jarm. Wills, 483, 5th edit.

(f) *Hetherington v. Oakman*, 2 Y. & Col. C. C. 299.

(g) *Re Pickworth*, (1899) 1 Ch. 642, 648 ; 68 L. J. 324, Ch. ; 80 L. T. Rep. N. S. 212, C. A.

(h) Broom’s Max. 538, 6th edit. ; Jarm. Wills, 436, 5th edit.

whole such a construction as will render every part of the will effective. In the attainment of this object the local order of clauses may be disregarded.(a)

Thus, where a testator bequeathed his residuary personalty to his two sisters, and subsequently by the same will appointed his wife residuary legatee, it was held that the latter gift did not revoke the former, as the second gift might operate on lapsed legacies.(b)

Lapse.

As a will does not take effect until the death of the testator, a testamentary gift is liable to failure, or, as it is technically called, lapse, by reason of the death of the devisee or legatee in the testator's lifetime.(c)

Giving a legacy to the legatee, his executors, administrators, or assigns will not prevent a lapse.(d)

Even a declaration that the devise or bequest shall not lapse does not *per se* prevent it from failing by the death of the donee in the testator's lifetime. Two things are, in ordinary cases, necessary to prevent a lapse, (1) the testator must in clear words exclude lapse, and (2) clearly indicate who is to take in case the legatee should die in his lifetime.(e)

Where there was a declaration in the will that legacies should not lapse, followed by a gift to a legatee and his executors or administrators, it was held that the legacy did not lapse.(f) But in a later case, where there was a similar gift with a direction that the legacy should vest from the date of the will, it was held that did not prevent a lapse.(g)

Where there is a devise or bequest to persons as joint tenants, no lapse can occur unless they *all* die in the testator's lifetime, as there is the right of survivorship between them, they taking *per my et per tout*. But if the gift be to persons as tenants in common, not being designated as a class, it is otherwise.(h)

However, where property is given to a fluctuating class of persons, to be ascertained at the testator's death, the decease of any of them before the testator will not cause a lapse, although such persons are made tenants in common. Thus, if property be given to the testator's brothers and sisters, equally to be divided between them, those brothers and sisters who survive the testator will take the whole property between

(a) *Shipperdson v. Tower*, 1 Y. & Coll. C. C. 441; *Kerr v. Baroness Clinton*, L. R. 8 Eq. 462.

(b) *Davis v. Bennett*, 30 Beav. 226; *Kilvington v. Parker*, 21 W. R. 121.

(c) Jarm. Wills, 307, 5th edit.

(d) *Maybank v. Brooks*, 1 Bro. C. C. 84; Jarm. Wills, 308, 5th edit.

(e) *Johnson v. Johnson*, 4 Beav. 318; *Sibley v. Cook*, 3 Atk. 572; *Browne v. Hope*, L. R. 14 Eq. 348; 41 L. J. 475, Ch.

(f) *Sibley v. Cook*, sup.

(g) *Browne v. Hope*, sup.

(h) Jarm. Wills, 310, 5th edit.; see, however, *Re Spiller*, 18 Ch. Div. 614; 50 L. J. 750, Ch.; 29 W. R. 782.

them to the exclusion of the representatives of any dying in the testator's lifetime.(a)

The cases are conflicting as to the effect of a gift to a class with a direction to settle each daughter's share upon her for life, and after her death upon her children. In *Re Speakman*(b) it was held that by such direction the share of a daughter dying before the testator leaving children did not lapse. But this case was not followed by the Court of Appeal in *Re Roberts*,(c) where, however, the gift was to nephews and nieces by name, and not to them as a class. It was, however, followed in *Re Pinhorne*,(d) where the gift was to the testator's sisters by name.

Where an estate is devised to one person charged with a sum payable to another, the charge does not lapse by the death of the person to whom the estate is given before the testator.(e)

Effect of 1 Vict. c. 26 on lapse.—This Act has made certain alterations and exceptions in the law as to lapse. By sect. 25, as already stated,(f) unless a contrary intention appears by the will, lapsed devises are to be included in the residuary devise, if one.

This section does not, however, alter the rule that where there is a devise subject to a charge, and the charge fails, such failure enures for the benefit of the particular devisee and not of the residuary devisee.(g)

Exceptions to the ordinary rule are made by sections 32 & 33 of the Act. By sect. 32 where a person to whom an estate tail, or quasi-entail, is devised, dies in the lifetime of the testator leaving issue inheritable under such entail living at the testator's death, such devise does not lapse, but takes effect as if the death of the devisee had happened immediately after the death of the testator, unless a contrary intention appears by the will. And by sect. 33 where a devisee or legatee is a child or other issue of a testator, and dies in the lifetime of the testator, leaving issue living at the death of the testator, such devise or bequest, not being an interest determinable at the death of the devisee or legatee, is not to lapse, but to take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Sect. 33 does not substitute for the predeceased devisee or legatee his issue, but makes the subject of the gift the property of such predeceased devisee or legatee; as he is, by a fiction, to prevent lapse, considered to

(a) Jarm. Wills, 311, 5th edit.; *Shuttleworth v. Greaves*, 4 My. & Cr. 35; 8 L. J. 7, Ch.; *Re Moss*; *Kingsbury v. Walter*, (1899) 2 Ch. 314; 68 L. J. 598, Ch.; 81 L. T. Rep. N. S. 139; 47 W. R. 642.

(b) 4 Ch. Div. 620; 46 L. J. 608, Ch.; 25 W. R. 225; 35 L. T. Rep. N. S. 731.

(c) 30 Ch. Div. 234; 53 L. T. Rep. N. S. 432.

(d) (1894) 2 Ch. 276; 63 L. J. 607; 70 L. T. Rep. N. S. 901; 42 W. R. 438.

(e) *Wigg v. Wigg*, 1 Atk. 382; *Oke v. Heath*, 1 Ves. 135.

(f) *Ante*, p. 521.

(g) *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 Jo. & H. 449; 7 L. T. Rep. N. S. 1091.

have survived his father. Therefore, if he makes a will sufficiently comprehensive, such property will pass thereunder.(a)

Nor does the section apply where the gift is to the testator's children as a *class*; for under such a gift, if one of his children dies in the testator's lifetime, the children who survive the testator will take according to the gift, although the dead child left issue. The Act was intended to apply only to cases of strict lapse.(b)

As to the effect on this doctrine of a direction to settle a daughter's share, see *ante*, p. 580.

In some other respects, however, sect. 33 has received a liberal construction. Thus, it has been held to apply to a case where a child died before the will was made, where he left issue living at the testator's death.(c)

So it has been held that it is not necessary to prevent a lapse that the issue living at the testator's death should be the same issue who was alive at the death of the legatee who has predeceased the testator. Therefore, a grandchild of the legatee living at the death of the testator will prevent a lapse.(d)

The section applies to a general power of appointment exercised by will;(e) but not to a special power of appointment exercised by will.(f)

To whom lapsed, &c., gifts pass.—It has already(g) been stated that lapsed devises now fall into the residuary devise, if one; but if there be no residuary devise realty undisposed of by the will, will pass to the testator's heir-at-law. Lapsed legacies will pass under the residuary bequest, if one, but if there be no residuary bequest, they will go to the testator's next of kin.

By the Intestates Estate Act, 1890 (53 & 54 Vict. c. 29), the real and personal estate of a man who dies intestate after 1st September, 1890, leaving a widow but *no issue*, where the net value thereof does not exceed 500*l.*, belongs to the widow absolutely and exclusively (sect. 1). If it exceeds this sum she is entitled to 500*l.*, part thereof for which she is to have a charge upon the whole of such real and personal estate, with interest at four per cent. per annum from the death until payment (sect. 2). The provision made by the Act is to be in addition to her interest in the residue of such real and personal estate after payment of the 500*l.* (sect. 4).

It has been held, however, on the construction of this Act, that it does

(a) *Johnson v. Johnson*, 3 Hare, 157; 13 L. J. 79, Ch.; *Re Hensler*, 19 Ch. Div. 612; 51 L. J. 303, Ch.; 45 L. T. Rep. N. S. 672.

(b) *Olney v. Bates*, 3 Drew. 319; 3 W. R. 606; *Re Harvey's Estate*, (1893) 1 Ch. 567; 62 L. J. 323, Ch.; 68 L. T. Rep. N. S. 562; 41 W. R. 293.

(c) *Mower v. Orr*, 7 Hare 473.

(d) *In bonis Parker*, 1 Sw. & Tr. 523; 31 L. J. 8, Pr.

(e) *Eccles v. Cheyne*, 2 K. & J. 676.

(f) *Holyland v. Lewin*, 26 Ch. Div. 266; 51 L. T. Rep. N. S. 14; 53 L. J. 530; 32 W. R. 443.

(g) *Ante*, p. 521.

not apply to a partial intestacy, such as a share of residue which has lapsed.(a)

If a testator dies without an heir and intestate as to lands in which he has the legal estate in fee, they escheat to the lord of whom they are held, who, in the case of freeholds, is usually the Crown;(b) which is not affected by sect. 1 of the Land Transfer Act of 1897.(c) Formerly, however, an equitable estate in fee did not escheat to the lord upon failure of heirs of the *cestui que trust*, for a trust is not a subject of tenure; and the lands thenceforth belonged to the trustee discharged from the trust.(d) So if the owner of a rentcharge in fee had died intestate and without heirs, there was no escheat, for there is really no estate, and no tenure. The rentcharge simply ceased to exist, and the lands out of which it issued were freed from its payment.(e)

By the Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), however, escheat for want of an heir on an intestacy of realty is to apply to any estate or interest, legal or equitable, in any incorporeal hereditament, or to any equitable estate or interest in any corporeal hereditament, whether devised or not to trustees by will (sect. 4).

As to the effect of this section on the death of a mortgagor intestate and without an heir, see *ante*, p. 241.

In regard to personal property, in the case of a will appointing executors and not making any express disposition of the residue of the personal estate, prior to 1 Will. 4, c. 40, the executors were at law entitled to such residue for their own use, and equity so far followed the law as to hold the executors so entitled, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein.(f)

The above statute, however, enacts that when any person dies after 1st September, 1830, having by his will or codicil appointed an executor or executors, he or they is or are to be deemed to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any undisposed of residue, unless it appears by the will or codicil that the executor or executors was or were intended to take such residue beneficially.

We have already shown that this statute has no application where there is an express bequest to executors.(g)

Sect. 2 enacts that the Act is not to prejudice the right of the executor where there are no next of kin. If, therefore, there are no next of kin,

(a) *Re Twigg's Estate*, (1892) 1 Ch. 579; 66 L. T. Rep. N. S. 604; 61 L. J. 445, Ch.

(b) Co. Lit. 3 b., 18 b.; Will. R. P. 126, 127, 13th edit.

(c) *In bonis Hartley*, (1899) P. 40; 68 L. J. 16, P.; 47 W. R. 287.

(d) *Taylor v. Hagarth*, 14 Sim. 8; *Beale v. Symonds*, 16 Beav. 406; Will. R. P. 167, 13th edit.

(e) Will. R. P. 341, 342, 13th edit.

(f) See preamb. to 1 Will. 4, c. 40; and as to cases prior to the Act, see Will. Exors. 1345, 9th edit.

(g) See *ante*, p. 545.

the law prior to the statute applies.(a) And if there be no intention on the face of the will to exclude them, the claim of the executors to the undisposed of residue will prevail against the claim of the Crown.(b)

However, prior to the Act it was held that the executors did not take the residue where the bequest thereof had lapsed.(c)

Order of Clauses in a Will.

Having briefly stated the law as it affects wills and testaments, we will now proceed to state the order in which the various clauses are usually placed in the will itself.

1. A will should commence with the name and description of the testator, coupled with a revocation of all other wills, and a declaration that the present is his last will.

2. Some conveyancers appoint executors and trustees at the commencement of the will, others at the end of it. An infant should not be appointed executor or executrix, as he or she cannot act until of full age. A married woman may, under the provisions of the Married Women's Property Act, 1882, be an executrix, as already(d) stated.

Some wills contain a direction for payment of the testator's funeral and testamentary expenses, and debts, without expressly conferring upon the executors or trustees a trust or power for the purpose of working out the charge of the debts on any real estate of the testator, which such a direction has been held to create.(e) The direction for payment of funeral and testamentary expenses and debts should properly be made after the trust for sale and conversion; the payment to come out of the proceeds thereof, as stated *post*. If the testator desires to charge his debts on some particular fund, or on his real estate, in exoneration of the personal estate, he should do so expressly; and formerly it was usual and proper to provide the requisite machinery for effecting such desire.(f) However, as already stated,(g) by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, in case of a death after 31st December, 1897, where real estate (other than copyholds requiring admittance) is vested in any person without a right in any other person to take by survivorship, it will, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives, as if it were a chattel real (sub-sects. 1, 2, 4).

The personal representative holds such real estate first for administration purposes, and then as a trustee for the beneficiaries who may require a transfer thereof under the circumstances, and after the time already (*ante*, pp. 29, 30) fully detailed. The Act, however, provides that it is not

(a) See *Taylor v. Hagarth*, 14 Sim. 8; *Re Bacon's Wills*, 31 Ch. Div. 460; 55 L. J. 368, Ch.; 54 L. T. Rep. N. S. 150; 34 W. R. 319.

(b) *Russell v. Clowes*, 2 Coll. 648; *Re Bacon's Will*, sup.; Will. Exors. 1344, n., 9th edit.

(c) *Bennett v. Batchelor*, 3 Bro. C. C. 28; Will. Exors. 1347, 9th edit.

(d) See *ante*, p. 20.

(e) See *ante*, p. 25.

(f) 4 David. Conv. 3, 3rd edit.

(g) See fully hereon, *ante*, p. 29.

to be lawful for some or one only of several joint personal representatives without the authority of the court to sell or transfer real estate (sect. 2, sub-sect. 2, *et ante*, p. 30); for it has been held that one of several executors can transfer personal estate.(a)

It has been held that realty under the Act vests in all the executors and not merely in those who prove the will, and all must join in conveying the legal fee simple in such realty.(b)

And where a person dies possessed of realty, the court in granting letters of administration is to have regard to the rights and interests of persons interested in his realty, and the heir-at-law, if not one of the next of kin, is to be equally entitled to the grant with the next of kin (sect. 2, sub-sect. 4). Where the intestate has left realty, but little or no personalty, and the title of the heir-at-law is clear, the grant will be made to him in preference to the next of kin,(c) or even, if desirable, to the claim of the husband when the wife dies.(d)

From the foregoing it will be seen that in case of a death after 31st December, 1897, it will be useless for a testator to appoint one set of persons as executors to deal with the personalty and another set of persons as trustees to deal with the realty (not being copyhold), as was sometimes done formerly.

3. After the appointment of executors it is usual to insert the gifts of the specific legacies and specific devises, unless in either case it is intended to settle the property given; for if so, it may be more convenient to place the gift or gifts in a subsequent part of the will.

4. After these follow the pecuniary legacies and any annuities that may be given.(e)

It has been held that a charge of debts and legacies on all the testator's real and personal estate charges them on specifically devised real estate.(f) But a general charge of legacies merely will not, as a rule, extend to lands specifically devised. However, the question is one of intention, and the will may show an intention to charge lands specifically devised.(g)

A mere charge of debts or legacies upon realty in aid of the personalty will not alter the primary liability of the personal estate to discharge these burdens.(h)

It should, if so desired, be declared that the legacies and annuities given are to be paid free from duty.

(a) *Ante*, p. 31.

(b) *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58; 69 L. J. 6, Ch.; 81 L. T. Rep. N. S. 507.

(c) *In bonis Barnett*, (1898) P. 145; 78 L. T. Rep. N. S. 391; 67 L. J. 85, P.

(d) *In bonis Ardern*, (1898) P. 147; 78 L. T. Rep. N. S. 536; 67 L. J. 70, P.

(e) See as to providing for annuities, *ante*, p. 554.

(f) *Maskell v. Farrington*, 6 L. T. Rep. N. S. 807; 7 *Id.*, 301; 8 Jur. 1198; *Mannox v. Greener*, L. R. 14 Eq. 456.

(g) *Conron v. Conron*, 7 H. L. Cas. 168; *Bank of Ireland v. McCarthy*, (1898) A. C. 181; 67 L. J. 13, P. C.; 77 L. T. Rep. N. S. 777.

(h) *Hayes & Jarm. Conc. Wills*, 429, 11th edit.; *Trott v. Buchanan*, 28 Ch. Div. 446; 54 L. J. 678, Ch.; 52 L. T. Rep. N. S. 248; 33 W. R. 339; *et ante*, p. 32.

5. Next in order should come the residuary gift of the real and personal property to the executors and trustees, which may be given separately or combined in one clause; however, usually given by the will upon trust to sell or convert into money the residuary real estate, if any, and such part of the personal estate as does not consist of money.^(a) But as before^(b) observed, it is the duty of the executors, in the absence of directions to the contrary, to sell personal property of a hazardous or wasting nature which is given to be enjoyed by persons in succession. It is, therefore, important to authorise the executors to postpone the conversion if they think it advisable; and to declare that the net income of the estate until conversion shall be applied as if it were income of the proceeds of such conversion; and that any realty directed to be converted shall, for the purposes of transmission, be considered as converted from the testator's death.

If copyholds are to be converted, they should not be devised to trustees upon trust for sale, but a power should be given to the trustees to appoint them, whereby the admittance and fine of the trustees are avoided.^(c)

The will then proceeds to direct that out of the proceeds of the sale and conversion, and out of the testator's ready money at the time of his death, his executors shall pay the testator's funeral and testamentary expenses and debts and the legacies bequeathed by the will, or any codicil thereto, and invest the residue of such moneys upon the trusts declared by the will. If these be for the testator's wife for life, and then for his children, they follow closely the forms in settlements of personal property already considered.^(d)

It may, however, be useful to briefly recapitulate them: they usually are (1) upon trust to pay the income to the wife until her death or future marriage; and (2) after either of these events, upon trust for the testator's children, sons (other than the son succeeding to unconverted real estate) who attain twenty-one, and daughters who attain that age or marry; or (3) if the wife remains unmarried, a power may be given to her to appoint the fund to the children; and in default of appointment to them as in the last trust; and (4) if this power is given, there must follow the usual hotchpot clause; (5) a clause of advancement.^(e) The clauses for maintenance, &c., may be omitted in reliance on the provisions to that effect in sect. 43 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), already^(f) considered. (6) Settlement of daughters' shares.^(g) (7) Trusts in default of any child attaining a vested interest.

6. After the foregoing any special powers may be given to the executors and trustees that may be thought necessary, as (1) a power to lease the realty until a sale can be made; or (2) that they shall have power to value and apportion mixed funds; and (3) if the testator is in trade, power to carry on the business.

(a) See 4 David. Conv. 5, 7, 3rd edit.

(b) *Ante*, p. 567.

(c) *Ante*, p. 379.

(d) See *ante*, p. 478, *et seq.*

(e) See forms 4 David. Conv. 570, 3rd edit.; 2 Prid. Conv. 587, 16th edit.

(f) *Ante*, p. 420.

(g) As to settlement estate duty, see *ante*, p. 105.

7. If the executors and trustees have not been appointed at the commencement of the will, they should now be appointed. If executors are not appointed, administration *cum testamento annexo* must be obtained.

8. If the testator's children, or any of them, are infants, a guardian should be appointed for them. The stat. 12 Car. 2, c. 24, enables a father to appoint a guardian for his children under the age of twenty-one, and not married at the time of his death, to continue during their infancy or any less time (sect. 8). And under this Act he may give authority to a surviving guardian to nominate a guardian in the place of one who has died.(a)

The Act does not enable a father to appoint a testamentary guardian to his illegitimate children.(b)

By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), on the death of the father of an infant the mother becomes guardian, either alone when no guardian has been appointed by the father,(c) or jointly with any guardian appointed by the father (sect. 2).

And now the mother of any infant may by deed or will appoint a person to be guardian of such infant after the death of herself and the father of such infant, if such infant is then unmarried; and where guardians are appointed by both parents they are to act jointly (sect. 3, sub-sect. 1). The mother may also provisionally nominate some fit person to act as guardian after her death jointly with the father, and the court, after her death, if shown to its satisfaction that the father is unfitted to be sole guardian of his children, may confirm the appointment (sect. 3, sub-sect. 2).

The proper form of such appointment by the mother is for the guardian to act "jointly with the father"; but the omission of these words is not fatal to the appointment.(d)

If any real estate of the testator is to be settled upon the usual trusts, instead of being converted into personalty, the reader is referred to what has already been stated hereon *ante*, p. 413, *et seq.*

As to gifts to the testator's widow: the household furniture and effects are usually given to her either for life or absolutely. As already pointed out, consumable articles in the testator's house can only be given absolutely. If the household effects are given to her for life only, with a gift over, or a direction for their sale after her death, the proceeds to become part of the residuary personalty, it is usual to direct the executors to cause an inventory thereof to be taken, and have two copies signed by the widow, one copy to be given to her and the other kept by the executors.

It is also usual to bequeath to the widow for her immediate use a legacy to be paid shortly after the testator's death.

In making a devise of land to the testator's wife it must be remembered

(a) *In bonis Parnell*, L. R. 2 P. & D. 379.

(b) *Sleeman v. Wilson*, L. R. 13 Eq. 36.

(c) See *Re X.*, (1899) 1 Ch. 526; 80 L. T. Rep. N. S. 311; 68 L. J. 265, Ch.; 47 W. R. 345, C. A.

(d) *Re G.*, (1892) 1 Ch. 292; 61 L. J. 490, Ch.; 66 L. T. Rep. N. S. 336.

that as to women married since the 1st January, 1834, the 3 & 4 Will. 4, c. 105, enacts that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for her benefit, she is not to be entitled to dower out of or in any land of her husband, unless a contrary intention is declared by his will (sect. 9). But no gift or bequest by the husband to his widow of or out of his personal estate, or of or out of any of his land *not* liable to dower, will defeat her right to dower, unless a contrary intention be declared by his will (sect. 10).

It has been held, however, that the gift to the widow of the income of part of the proceeds of the husband's real estate directed to be sold, is a gift to her of an "interest in land" within sect. 9, and bars her right to dower.(a)

It has been shown(b) that by sect. 30 of 44 & 45 Vict. c. 41, in case of a death after 31st December, 1881, trust and mortgage estates of freeholds pass to the personal representatives of the deceased, notwithstanding any testamentary disposition. Copyholds, however, to which the tenant has been admitted are, by 57 & 58 Vict. c. 46, s. 88, excluded from the operation of the above section. Therefore, as to these, an express devise of them to a particular trustee, or to the trustees and executors of the will may be desirable. It will be remembered that mortgagees of copyholds are rarely admitted.(c) And if a testator wishes his freehold trust estates to pass to particular persons he can appoint them executors of his will.

Executors or trustees have power to appropriate specific assets to answer settled shares of residue, even if the interests of infants are concerned.(d) And by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), sect. 4, the personal representatives of a deceased person may, if there be no express provision to the contrary in the will, with the consent of the person entitled to a legacy or share of the residue, or if he be a lunatic or an infant, of his committee or guardian, appropriate any part of the deceased's residuary estate in or towards satisfaction of the legacy or share, and for that purpose may value the estate. But notice must first be given to all persons interested in the residuary estate, any of whom may apply to the court, and such valuation and appropriation is to be conclusive, save as otherwise directed by the court.

As to the testator's business: an executor or administrator is not justified in continuing the testator's or intestate's business without an express authority, save for the purpose of completing contracts and winding-up the business.(e) And if he does carry on the business he

(a) *Lacey v. Hill*, L. R. 19 Eq. 346; 44 L. J. 215, Ch.; 23 W. R. 285; 32 L. T. Rep. N. S. 48; *Thomas v. Howell*, 34 Ch. Div. 167; 56 L. J. 9, Ch.; 55 L. T. Rep. N. S. 629.

(b) *Ante*, pp. 66, 238.

(c) See *ante*, p. 211.

(d) *Re Richardson*, (1896) 1 Ch. 512; 65 L. J. 512, Ch.; *Re Niskels*, (1898) 1 Ch. 630; 78 L. T. Rep. N. S. 379; 67 L. J. 406, Ch.; 46 W. R. 422.

(e) *Collinson v. Lister*, 20 Beav. 356; *Re Millard and Yates*, 72 L. T. Rep. N. S. 823, C. A.

runs great risks, even though an executor does so under a direction in the will. If the trade be beneficial the executor or administrator must account for all profits; if it prove a losing concern, he will, on failure of assets, be personally responsible for debts contracted since the testator's death.(a)

If an executor carries on his testator's business under a direction in the will limited to a particular sum, he is not justified in employing a larger sum.(b) However, where the executors are empowered by the will to carry on their testator's business and employ therein such part of his estate as they think desirable, they are entitled, in priority to the claims of the testator's creditors, to be indemnified out of the testator's estate against liabilities which they have properly incurred. And this indemnity is not limited to such part of the assets as have come into existence or changed its form since the testator's death.(c)

If the testator is in partnership the executors should be authorised to make arrangements with the continuing partners either as to the mode of winding-up the business or as to leaving the testator's share in the business; subject, of course, to any clause on this point in the partnership deed.

It is no longer necessary to give to executors or administrators a power to compound, &c., debts. By the Trustees Act, 1893 (56 & 57 Vict. c. 53), sect. 21, an executor or administrator may pay or allow any debt or claim or any evidence he thinks sufficient (sub-sect. 1). And by sub-sect. 2, an executor or administrator, or two or more trustees acting together, or a sole acting trustee, where a sole trustee is authorised by the trust instrument to execute the trusts and powers thereof, may accept any composition or security, real or personal, for any debt, or for any property, real or personal, claimed; and may allow any time for payment for any debt, and may compromise, compound, or abandon, submit to arbitration, or otherwise settle any debt, account, claim, &c., relating to the deceased's estate or to the trust; and for any of those purposes may enter into, execute, and do such agreements, instruments of composition, releases, &c., as may seem expedient without being responsible for any loss occasioned by any act or thing so done in good faith.

The section applies only if and so far as a contrary intention is not expressed in the trust instrument, if any (sub-sect. 3).

It applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of the Act (sub-sect. 4).

The section is a re-enactment of sect. 37 (now repealed) of the Conveyancing Act, 1881, with the addition of the word "administrator," which was not in that statute.

As to other trustee clauses, the powers of sale by trustees and executors have already (*ante*, pp. 24-31) been fully considered.

(a) Will. Exors. 1682, 1816, 9th edit.

(b) *Es parte Garland*, 10 Ves. 110; *Es parte Richardson*, 3 Mad. 138.

(c) *Dowse v. Gorton*, (1891) A. C. 190; 64 L. T. Rep. N. S. 809; 60 L. J. 745, Ch.; 40 W. R. 17.

It has also been shown that legislative enactments have rendered unnecessary the insertion in a trust instrument of a power for trustees to give receipts. And that a trustee may appoint his solicitor his agent to receive and give a discharge for trust money, &c., by permitting him to have and produce a deed containing such a receipt as is mentioned in sect. 56 of the Conveyancing Act, 1881.(a)

So statutory enactments have, as already shown,(b) rendered it unnecessary to insert a clause for the appointment of new trustees, save for the purpose of stating by whom the statutory power is to be exercised. And provision is made for the retirement of trustees, as stated *ante*, p. 458. And the Judicial Trustee Act, 1896, applies to executors and administrators (sect. 1, sub-sect. 2).

So statutory enactments have rendered it unnecessary to insert a clause for the indemnity and reimbursement of trustees, as shown *ante*, p. 463.

As to investments by trustees, see *ante*, p. 449.

As to renewal of renewable leaseholds by trustees, see *ante*, p. 344. And as to insurance by them, see *ante*, p. 463.

By the Trustee Act, 1893, sect. 50, the expressions trust and trustee include (*inter alia*) the duties incident to the office of personal representative of a deceased person.

On the final adjustment of the trust accounts it is usual for the trustee on handing over the balance to the beneficiaries to require from them an acknowledgment that all claims and demands have been settled, and a release under seal.(c) In strict right, however, a trustee cannot, as a rule, insist on a release under seal.(d) It seems an executor can, on the estate being wound-up, claim a release from a residuary, though not from a pecuniary legatee.(e) And when the trust fund is transferred from retiring to new trustees it is usual to ask the new trustees to give the retiring trustees a release, but it would seem that they are not entitled to insist upon this.(f)

The deed of release should contain full recitals of the dealings with the trust fund by the trustees, and of the examination and approval of the accounts, and as to the distribution of the trust fund; as no general words of release, however sweeping, will extend to release any other claims than those specified in the recitals.(g)

We have already(h) stated the effect, as to profit costs, of a solicitor being appointed a trustee. And it has been recently decided that when a solicitor is appointed executor and trustee, empowered by the will to make professional charges as solicitor to the estate, he will not be entitled

(a) See fully *ante*, pp. 151, 454.

(b) *Ante*, p. 455.

(c) See Lewin on Trusts, 398, 9th edit.

(d) *Re Wright's Trust*, 3 K. & J. 421; *King v. Mullins*, 1 Drew, 311.

(e) Lewin on Trusts, 398, 9th edit.

(f) Lewin on Trusts, 399, 9th edit.; *Re Cater*, 25 Beav. 366.

(g) 5 David. Conv. 146, 147, Pt. 2, 3rd edit.; *et ante*, p. 126.

(h) *Ante*, p. 485.

to his profit costs as against creditors if the estate proves insolvent. The right to charge profit costs is considered as a legacy.(a)

A direction in a will appointing a particular person solicitor to the trust estate imposes no trust or duty on the trustees of the will to continue such person their solicitor in the management of the estate.(b)

Completion.

The will having been drawn, an appointment is made with the testator to read it over to him. After it has been approved of by him it is fair copied on brief paper, and signed by him in the mode pointed out, *ante*, p. 502. This done the will is either handed over to the testator, or left with the solicitor, or deposited in the principal Probate Registry under 20 & 21 Vict. c. 77, s. 91, for safe custody.

Forms of wills will be found in Hayes and Jarman's Concise Forms of Wills; 2 Key and Elphinstone's Conveyancing; 4 Davidson's Conveyancing; and Wolstenholme's Forms of Conveyancing.

Probate and letters and administration may now, by the Land Transfer Act, 1897,(c) be granted in respect of real estate only, although there is no personal estate (sect. 1, sub-sect. 3). And it must be remembered that by 57 & 58 Vict. c. 30, sects. 1 and 2, estate duty(d) is payable on realty as well as on personalty. Formerly it was contrary to the practice of the court to make a grant of probate of a will relating to realty only.(e)

(a) *Re White; Pennell v. Franklin*, (1898) 1 Ch. 297; 2 *Id.*, 217; 67 L. J. 502, Ch.; 78 L. T. Rep. N. S. 770, C. A.

(b) *Foster v. Eleley*, 19 Ch. Div. 518; 51 L. J. 275, Ch.

(c) See *ante*, pp. 29, 584.

(d) See *ante*, p. 105.

(e) *Re Bootle*, L. R. 3, Pr. & D. 177.

CHAPTER XII.

PARTNERSHIP.

Nature of Partnership.

PARTNERSHIP is defined by the Partnership Act, 1890 (53 & 54 Vict. c. 39), sect. 1, as the relation which subsists between persons carrying on a business in common with a view of profit. But (1) the relation between members of a company registered under the Companies Act, 1862, &c., or (2) a company incorporated under any other Act of Parliament, or by letters patent or Royal Charter, or (3) a mining company of mines within and subject to the jurisdiction of the Stannaries, is not a partnership within this Act: (sect. 1.) By 59 & 60 Vict. c. 45, however, the court of the vice-warden of the Stannaries is abolished, and its jurisdiction is transferred to such county courts as the Lord Chancellor directs; and a judge of any such court may, on application, order any mining dispute to be tried before himself, or an arbitrator, or an officer of the court (sects. 1, 4).

In determining whether a partnership does or does not exist regard is to be had to the following rules:—

(1) Joint tenancy, tenancy in common, common property, or part ownership does not of itself create a partnership as to anything so held or owned, although the profits are shared. (2) Nor of itself does the sharing of *gross* returns from property, whether those sharing have or have not a joint or common interest therein. (3) Although the receipt by a person of a share of the profits of a business is *prima facie* evidence of partnership, the receipt thereof, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner therein.

And in particular (A) the receipt by a person of a debt by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner therein; nor (B) does a contract for the remuneration of a servant or agent according to the profits; nor (C) the receiving profits by way of an annuity by the widow or child of a deceased partner; nor (D) the lending money to a person in business under a written contract, signed by all parties, and receiving interest varying with the profits, or a share of the profits; nor (E) the receiving by way of annuity or otherwise

of a share of the profits of a business for the sale of the goodwill.(a) In cases (D) and (E), however, such lender of money or vendor of goodwill will not, in the event of the bankruptcy, &c., of the person in business, be entitled to receive anything until all other creditors have been satisfied.(b)

It will be noticed that under sect. 2 (D) in order to prevent a contract of loan, &c., being one of partnership it must be in writing and signed. But under sect. 3 the lender may, in case of the borrower's bankruptcy, be postponed to other creditors although the contract is not in writing.(c)

The Act further provides that a person may, by representing or holding himself out as a partner in a firm, become liable as such to everyone who has on the faith thereof given credit to the firm. This representation may be by words spoken or written, or by conduct, or by knowingly suffering himself to be so represented. But the continued use of a dead partner's name in the previous style of the firm does not of itself make his executors or administrator's estate liable for debts contracted after his death.(d)

Relations of Partners to Third Parties.

Each partner is the accredited agent of the rest, and may bind the firm by *simple contracts* in all matters incident to the business of the firm (unless the person dealing with him knows he has no authority in the particular matter); as by bill, note, or receipt; and may even give a valid *release by deed*, but he cannot in other cases bind the firm by *deed* unless he have express authority by deed for that purpose; nor by submission to arbitration. So, where loss or injury is caused to third persons by the wrongful act or omission of a partner acting in the ordinary course of the business of the firm, the firm is liable for it to the same extent as the partner so acting or omitting to act.(e)

It is not within the scope of the implied authority of a member of a firm of solicitors to constitute himself a constructive trustee so as to make his partners liable.(f)

And if a partner, being a trustee, improperly employs the trust property in the partnership business, no other partner is liable, unless a partner has notice of the breach of trust. And the trust money may be recovered from the firm if still in its possession or under its control.(g)

Notice to any acting partner is notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.(h)

(a) Sect. 2.

(b) Sect. 3.

(c) *Re Fort* (1897), 2 Q. B. 495; 66 L. J. 824, Q. B.; 77 L. T. Rep. N. S. 274; 46 W. R. 147, C. A.

(d) See sect. 14.

(e) See 53 & 54 Vict. c. 39, ss. 5 to 12; Lind. Part. 141, 146, 147, 149, 155, 159, 6th edit.

(f) *Mara v. Brown*, (1896) 1 Ch. 199; 65 L. J. 225, Ch.; 73 L. T. Rep. N. S. 638; 44 W. R. 330 C. A.

(g) 53 & 54 Vict. c. 39, s. 13.

(h) Sect. 16.

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.(a)

On the other hand, a retiring partner does not thereby cease to be liable for the partnership debts and obligations incurred before his retirement.(b) But, as between himself and the continuing partners, he may be discharged therefrom by agreement. Also as to the creditors, if they agree to accept the new firm as their debtors; which is usually termed a novation. To avoid liability for future debts of the firm he should (1) remove his name from the firm, and (2) give notice thereof in the *London Gazette*, which is sufficient to all who have not previously dealt with the firm, but (3) to those who have so dealt express notice must be given.(c)

In the case of a dormant partner, that is, one not generally known to be a partner, who retires, he need only give express notice to those persons who knew him to be a partner;(d) for as to others, he is not liable for partnership debts contracted after his retirement.(e) But even a dormant partner may be liable on continuing contracts. Thus, when the managing partner of a firm, consisting of himself and two dormant partners, retained a solicitor to recover a partnership debt, and during the pending of the action the two dormant partners retired, but did not give notice thereof to the solicitor. Subsequently judgment was obtained. And it was held that the contract of retainer to the solicitor was an entire contract to carry on the action to its termination, save for good cause, and that he was entitled in the absence of notice from the retiring partners to recover from them the costs incurred subsequent to their retirement.(f)

Relations of Partners to one another.

All partnership property must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement. But the legal estate or interest in any land belonging to the partnership is to devolve according to the nature and tenure thereof, &c., but in trust, so far as necessary, for the persons beneficially interested in the land.(g)

Therefore, if the partners are jointly seized of or entitled to any land belonging to the partnership, it will, on the death of a partner, devolve on the surviving partners, but they will hold it in trust for the persons beneficially interested therein.(h)

And where co-owners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of it, and purchase other land out of the profits to be used in like manner, they are, in the absence of an agreement to the contrary, not partners, but co-owners

(a) Sect. 17, sub-sect. 1.

(b) Sect. 17, sub-sect. 2.

(c) See sect. 17 (3), sects. 36, 37; Lind. Part. 70, 220, 247, 6th edit.

(d) Lind. Part. 71, 223, 6th edit.

(e) 53 & 54 Vict. c. 39, s. 36, sub-s. 3.

(f) *Court v. Berlin*, (1897) 2 Q. B. 396; 66 L. J. 714, Q. B.; 77 L. T. Rep. N. S. 293; 46 W. R. 55, C. A.

(g) 53 & 54 Vict. c. 39, s. 20, sub-s. 1, 2.

(h) Lind. Part. 331, 349, 6th edit.

thereof, for the same respective estates and interests as they have in the original land.(a)

Unless the contrary appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.(b) And where land has become partnership property, it is, unless the contrary appears, to be treated as between the partners and the representatives of a deceased partner, &c., as personal, and not as real estate.(c)

The above enactments as to partnership property only apply so far as they are not controlled by special agreement between the partners, which will still be the ultimate test thereon.(d)

The Act of 1890, sect. 24, provides that, subject to any agreement, express or implied, the interests of partners in the partnership property, and their rights and duties in relation to the partnership, are to be determined by the following rules :

(1) All the partners are to share equally in the capital and profits, and to contribute equally to all losses. (2) The firm must indemnify every partner in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the business of the firm, or in anything necessarily done for the preservation of its property. (3) A partner advancing money beyond the amount of his share of capital is entitled to interest at 5 per cent. per annum. (4) A partner is not entitled, before the ascertainment of profits, to interest on his capital. (5) Every partner may take part in the management of the business; (6) but is not entitled to remuneration for acting therein. (7) No person may be introduced as a partner without the consent of all existing partners. (8) Differences connected with the partnership business may be decided by a majority of the partners, but not so as to change the nature of the business. (9) The partnership books are to be kept at the place (or principal place) of business, and every partner may inspect and copy them.(e)

As to the first rule of sect. 24, if it is not intended that all the partners should share equally in capital and profits, but according to their contributions, a stipulation to that effect should be introduced into the partnership agreement; as the rule would, no doubt, in some cases, lead to injustice, if not negatived.(f)

An agreement for inequality may, however, be inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books.(g)

As rule 6 disentitles a partner from receiving remuneration for his services, it follows that if one partner is to manage the business for the others and to receive remuneration, a provision to that effect must be inserted in the articles of partnership.(h)

(a) 53 & 54 Vict. c. 39, s. 20, sub-s. 3.

(b) Sect. 21.

(c) Sect. 22.

(d) See sect. 19; Lind. Part. 332, 6th edit.

(e) 53 & 54 Vict. c. 39, s. 24.

(f) See Lind. Part. 355, 356, 6th edit.

(g) Lind. Part. 356, 6th edit.; see also sect. 44, *post*.

(h) See Lind. Part. 393, 6th edit.; *Williamson v. Hine*, (1891) 1 Ch. 390; 60 L. J. 123, Ch.; 63 L. T. Rep. N. S. 682; 39 W. R. 239.

Rule 7 is supplemented by sect. 31 of the Act, which provides that an assignment by a partner of his share in the partnership, absolute or by way of mortgage, does not entitle the assignee to interfere in the management of the business or to require accounts thereof, or to inspect the partnership books, but merely entitles him to receive the assignor's share of profits; and in case of a dissolution, also of the assignor's share of the partnership assets, and to an account as from the date of the dissolution. But by sect. 28, the legal personal representative of a partner is entitled to an account of the partnership transactions.

Rule 8 is supplemented by sect. 25 of the Act, which enacts that no majority of partners can expel any partner except under a power conferred by express agreement.

Any partner may determine a partnership at will by giving written notice of his intention to do so to all the other partners.(a)

Where a partnership entered into for a fixed term is continued after the term has expired, and without any new agreement, the rights and duties of the partners remain the same so far as consistent with the incidents of a partnership at will.(b)

Partners must render true accounts, and account for all profits made.(c)

Execution cannot be issued against partnership property except on a judgment against the firm. To satisfy a judgment against a partner a charging order and receiver must be applied for of his interest in the partnership property and profits. The application is made by summons served on the judgment debtor, and his partners who may redeem his interest.(d)

Dissolution of Partnership.

Subject to agreement between the partners a partnership is dissolved (A) If entered into for a fixed term, by its expiration(e); (B) if entered into for a single undertaking by its termination; (C) if entered into for an undefined term, by notice by any partner to the others, as already stated.(f)

And subject as above, an ordinary partnership is dissolved by the death or bankruptcy of a partner; and at the option of the other partners, also if any partner suffers his share of the partnership property to be charged under the Act for his separate debt.(g) So a partnership is dissolved by the happening of any event which makes its continuance unlawful.(h) But as shown *ante*, p. 591, certain companies are excepted from the operation of the Act.

And on application the court may dissolve a partnership (A) where a partner is found lunatic by inquisition, or is shown to be of *permanently* unsound mind, or (B) permanently incapable of performing his part of the partnership contract, or (C) has been guilty of conduct calculated to prejudicially affect the carrying on of the business, or (D) wilfully commits

(a) See 53 & 54 Vict. c. 39, sects. 26, 32, c.

(b) Sect. 27.

(c) Sects. 28 to 30.

(d) Sect. 23; R. S. C. Order, 46, r 1, a.

(e) But see sect. 27, *supra*.

(f) Sects. 26, 32, *et supra*.

(g) Sect. 33.

(h) Sect. 34.

a breach of the partnership agreement, or so conducts himself in the business that it is not practicable to carry it on with him, or (E) where the business can only be carried on at a loss, or (F) where the court thinks it is just and equitable that the partnership should be dissolved.(a)

When a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members, until he has notice of the change. An advertisement in the *London Gazette* is notice to persons who had not dealings with the firm before the date of the dissolution or change so advertised. The estate of a partner who dies, becomes bankrupt, or of an unknown partner who retires from the firm, is not liable for partnership debts contracted after the death, bankruptcy, or retirement respectively.(b)

After a dissolution the authority of each partner to bind the firm, and the other rights and obligations of the partners continue so far as may be necessary to wind up the partnership affairs and to complete unfinished transactions, but not otherwise.(c)

In settling accounts between partners after a dissolution, subject to agreement, the following rules are to be observed: (A) Losses are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits. (B) Assets are to be applied thus, (1) in paying the debts and liabilities of the firm to persons not being partners; (2) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital; then (3) what is due to him in respect of capital; (4) the ultimate residue, if any, is to be divided among the partners in the proportion in which profits are divisible.(d)

When a partner has died or retired, and the surviving or continuing partners carry on the business with its capital or assets without any final settlement of accounts, then, subject to an option to purchase his share by the partnership agreement, the outgoing partner or his estate is entitled at the option of himself or his representatives, to a share of the profits made since the dissolution, proportionate to the use of his share of the partnership assets, or to interest thereon at 5 per cent per annum.(e)

There are two modes used in partnership contracts for providing for the death or retirement of a partner before the determination of the partnership term. One plan is to provide that the share of capital shall be taken at its value as ascertained by the last yearly balance-sheet, with a sum by way of interest from that time to the time of death or retirement in lieu of profits. This plan prevents a fresh balancing of accounts, &c., but it is open to the objection that any losses that may have occurred since that event will fall on the continuing partners. Another plan is to give the continuing partners the option of purchasing the share of the deceased or retiring partner at a valuation. If anything is to be allowed for goodwill in such a case it should be so stated.(f)

(a) Sect. 35.

(c) Sect. 38; see also sect. 39.

(e) Sect. 42.

(b) Sects. 36, 37, *et ante*, p. 593.

(d) Sect. 44.

(f) See 2 Prid. Conv. 737, 16th edit.

When the share of a deceased partner is so taken over at a valuation, the valuation should proceed on the footing that the business is being sold, (a) for the reason stated *infra*.

The term goodwill is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. (b)

On this point it must be remembered that if a person sells the goodwill with his business, that, in the absence of express stipulation, does not prevent him from recommencing a similar business in the immediate vicinity of the place where the old one was carried on. But he must not solicit the customers of the old business. (c)

On such a sale therefore the vendor should covenant not to carry on a similar business within such a distance from the place of the business sold as is necessary for the protection of the purchaser.

It has also been held that on a dissolution of a partnership between solicitors, in the absence of express stipulation, each partner is entitled to use the old firm name, - provided such use does not expose the other partners to liability or risk. Risk for this purpose meaning appreciable risk in a business sense. (d)

Clauses in Partnership Deeds.

It will be gathered from the foregoing remarks that the Partnership Act, 1890, has to a great extent rendered it unnecessary to insert in partnership agreements special clauses on such subjects as are fully provided for by the Act. However, clauses may still be necessary on the following matters: (1) The commencement and duration of the partnership; (2) the name of the firm, the nature of the business, and the place of business; (3) the bankers of the firm; (4) the capital and property of the firm; (5) allowances for interest on capital and advances; (6) the time and attention to be given to the business by the partners, and whether any partner is to be entitled to remuneration for his services, or whether he may carry on any other business; (7) the keeping of proper books of account; (8) in what proportions and how often shares of profits are to be drawn out by partners; (9) as to annual or half-yearly stocktaking; (10) as to expelling any partner for just cause; (11) as to the retirement or death of any partner before the end of the term; (12) to whom any patent worked by the firm is to belong on a dissolution; (13) the like as to the goodwill; (14) as to the dissolution of the firm;

(a) *Re David and Matthews*, (1899) 1 Ch. 379; 68 L. J. 185, Ch.; 80 L. T. Rep. N. S. 75; 47 W. R. 313.

(b) Lind. Part. 441, 6th edit.

(c) *Labouchere v. Dawson*, L. R. 13 Eq. 322; 41 L. J. 427, Ch.; 25 L. T. Rep. N. S. 894; 20 W. R. 309; *Trego v. Hunt* (1896) A. C. 7; 65 L. J. 1 Ch.; 73 L. T. Rep. N. S. 514; 44 W. R. 225; overruling *Pearson v. Pearson*, 27 Ch. Div. 145; see also *Jennings v. Jennings*, (1898) 1 Ch. 378; 67 L. J. 190, Ch.; 77 L. T. Rep. N. S. 786; 46 W. R. 344.

(d) *Burchell v. Wilde*, 69 L. J. 314, Ch.; (1900) 1 Ch. 551, C. A.

(15) the usual arbitration clause,(a) and such other special clauses as may be necessary, some of which we have already considered.

As to the form of the deed, recitals are seldom necessary in a partnership deed. After the date and parties the operative part usually follows, consisting of mutual covenants by all the intended partners to enter into partnership for the specified purpose. Such of the clauses above set out as may be necessary in each particular case then follow.

Stamps.—No duty is payable on money brought into the business as capital; the agreement of partnership in such a case is charged with the fixed duty of 10s. as a deed, if under seal; or with 6d. if under hand only.(b) But where a premium is paid by an incoming partner to the owner of the business, *ad valorem* conveyance duty is payable on the amount of the premium paid.(c)

(a) See Lind. Part. 412, *et seq.*, 6th edit.

(b) See 54 & 55 Vict. c. 39, s. 22, and Sch. ; Alpe on Stamps, 110, 5th edit.

(c) Alpe, *sup.*

CHAPTER XIII.

SOLICITORS' REMUNERATION.

The Solicitors' Remuneration Act, 1881.

The Solicitors' Remuneration Act of 1881 (44 & 45 Vict. c. 44), and the general order made thereon, now regulate the remuneration of solicitors in all ordinary conveyancing business.

Interpretation.—By sect. 1, sub-sect. 3, “solicitor” means a solicitor or proctor qualified according to the statutes in that behalf:

“Client” includes any person who, as a principal, or on behalf of another, or as a trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements:

“Person” includes a body of persons corporate or unincorporate.

General Orders, &c.—Sect. 2 provides for the making of general orders for remuneration in conveyancing, &c. Sect. 3 provides that before any such general order is made, a copy thereof is to be laid before the council of the Incorporated Law Society, &c.

Sect. 4 provides that any general order under the Act may, as regards the mode of remuneration, prescribe the principles thereof.

By sect. 5 any general order under the Act may authorise and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, to be ascertained by taxation or otherwise, and the allowance of interest.

By sect. 6 any general order under the Act is not to take effect until it has been laid before each House of Parliament, and one month thereafter has elapsed, &c.

By sect. 7 as long as any general order under the Act is in operation, the taxation of bills of costs of solicitors is to be regulated thereby.

Agreements.—By sect. 8 it is provided that (1) with respect to any business to which the foregoing provisions of the Act relate, whether any general order is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such

- manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly.

(2.) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf.

The agreement need not be signed by the other party.(a)

(3.) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of the remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters.

(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor, shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts, and certify the same to the court; and if, upon such certificate, it shall appear to the court or judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit.

By sect. 9 the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), shall not apply to any business to which this Act relates.

The General Order.

1. This order is to take effect from and after the 31st day of December, 1882, except that sched. 1 hereto shall not apply to transactions respecting real property, the title to which has been registered under the Acts of 25 & 26 Vict. c. 53, 25 and 26 Vict. c. 67, and 38 & 39 Vict. c. 87.(b)

2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, is to be regulated as follows, namely:—

(a.) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business,

(a) *Re Frappe*, (1893) 2 Ch. 284; 62 L. J. 473, Ch.; 68 L. T. Rep. N. S. 47, 558; 41 W. R. 232, 417, C. A.

(b) The Act 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), and amending Act, 60 & 61 Vict. c. 65 (Land Transfer Act, 1897), are given in the next following chapter.

whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in part 1 of sched. 1 to this order, and to be subject to the regulations therein contained.

A mortgage must be a completed transaction, and if the money to be secured thereby is not advanced, the solicitor is not entitled to charge a scale fee for preparing and completing the transaction.^(a) And the *ad valorem* duty authorised by sched. 1 (*infra*) is chargeable only where the whole of the business, in respect of which it is imposed, viz., the deducing title and the perusing and completing conveyance, is done. And where there is no deducing of title, but only perusal and completion of the conveyance, sched. 1 does not apply, but that under rule 2 (c) the solicitor's remuneration is regulated by the old system as modified by sched. 2, stated *infra*.^(b)

(b.) In respect of leases, and agreements for leases, of the kinds mentioned in part 2 of sched. 1 to this order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in part 2 of such sched. 1.

(c.) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in sched. 1 hereto, prescribed, but which is not in fact completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgages, or further charges, not provided for hereinbefore or in sched. 1 hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in sched. 1 hereto, prescribed, the remuneration is to be regulated according to the present system as altered by sched. 2 hereto.

The costs of an attempted ineffectual sale of property, where there is no probability of the sale being effected for some years, should be taxed under clause 2 (c) *supra*.^(c)

3. Drafts and copies made in the course of business, the remuneration for which is provided for by this order, are to be the property of the client.

4. The remuneration prescribed by sched. 1 to this order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record, roll, or other disbursement reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, such as

(a) *Re Bircham*, (1895) 2 Ch. 786; 64 L. J. 768, Ch.; 73 L. T. Rep. N. S. 129; 43 W. R. 673, C. A.

(b) *Re Lacey*, 25 Ch. Div. 301; 53 L. J. 287, Ch.; 49 L. T. Rep. N. S. 755; 32 W. R. 233, C. A.

(c) *Re Smith and Pinsent*, 44 Ch. Div. 303; 59 L. J. 590, Ch.; 38 W. R. 685.

the death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court, but it shall include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying and parchment, and all other similar disbursements.

The mere copying of a plan is included also.(a)

5. In respect of any business which is required to be, and is, by special exertion, carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration for the special exertion, according to the circumstances.

6. In all cases to which the scales prescribed in sched. 1 hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by sched. 2 hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order.

The election cannot be made after the business has commenced.(b)

It has also been held that sending to the client a bill of costs made out in the old form is not a sufficient election by the solicitor to charge on the old system as modified by sched. 2.(c)

7. A solicitor may accept from his client, and a client may give to his solicitor, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or the other person liable.

8. In this order, and the schedules hereto, the following words and expressions shall have the meaning ascribed to them in the 3rd sub-sect. of sect. 1 of the Solicitors' Remuneration Act, 1881, viz.:—solicitor, client, person (*ante*, p. 599).

(a) *Re Read*, (1894) 3 Ch. 238; 63 L. J. 831, Ch; 71 L. T. Rep. N. S. 189; 42 W. R. 601.

(b) *Re Allen*, 34 Ch. Div. 433; 56 L. J. 487, Ch.; 56 L. T. Rep. N. S. 6; 35 W. R. 218.

(c) *Fleming v. Hardcastle*, 52 L. T. Rep. N. S. 851; 33 W. R. 776.

SCHEDULE 1—PART 1.

Scale of Charges on Sales, Purchases, and Mortgages, and Rules applicable thereto.

SCALE.

	(1.) For the 1st 1000 <i>l</i> .	(2.) For the 2nd and 3rd 1000 <i>l</i> .	(3.) For the 4th and each subsequent 1000 <i>l</i> . up to 10,000 <i>l</i> .	(4.) For each subsequent 1000 <i>l</i> . up to 100,000 <i>l</i> .*
Vendor's solicitor for negotiating a sale of property by private contract	20 <i>s</i> . per 100 <i>l</i> .	20 <i>s</i> . per 100 <i>l</i> .	10 <i>s</i> . per 100 <i>l</i> .	5 <i>s</i> . per 100 <i>l</i> .
Do., do., for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> . "
When the property is not sold, then on the reserved price	10 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> . "	1 <i>s</i> . 3 <i>d</i> . "
[N.B.—A minimum charge of 5 <i>l</i> . to be made whether a sale is effected or not.]				
Do., do., for deducing title to freehold, copyhold, or leasehold property, and perusing, and completing conveyance (including preparation of contract, or conditions of sale, if any)	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> . "
Purchaser's solicitor for negotiating a purchase of property by private contract...	20 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> . "
Do., do., for investigating title to freehold, copyhold, or leasehold property and preparing and completing conveyance (including perusal and completion of contract, if any)	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> . "
Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing...	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> . "
Mortgagee's solicitor for negotiating loan	20 <i>s</i> .	20 <i>s</i> .	5 <i>s</i> .	2 <i>s</i> . 6 <i>d</i> . "
Do., do., for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage	30 <i>s</i> .	20 <i>s</i> .	10 <i>s</i> .	5 <i>s</i> . "
Vendor's or mortgagor's solicitor for procuring execution and acknowledgment of deed by a married woman	2 <i>l</i> . 10 <i>s</i> . extra.			

* Every transaction exceeding 100,000*l*. to be charged for as if it were for 100,000*l*.

An advowson in gross, though an incorporeal hereditament, is freehold property within part 1 of sched. 1.(a)

The whole of the business must be done in order that the scale may apply, as already stated.(b)

There may, it has been held, be an investigation of title without any abstract of title being furnished. If there has been an investigation of such title as there was, that is sufficient.(c) But in a subsequent case it was held that a solicitor to a mortgagor of leaseholds who simply produces and delivers an abstract of the leases under which the mortgagor holds, has not deduced a title within the meaning of part 1 of sched. 1, and therefore cannot charge the scale fee.(d)

Under "mortgagee's solicitor for negotiating loan" in part 1 of sched. 1, a solicitor is entitled to charge the scale fee for negotiating the loans, notwithstanding that they are not exclusively upon freehold, copyhold, or leasehold property. The word "loan" in the schedule means a loan on mortgage.(e)

The words "completing conveyance" in part 1 of sched. 1 cover the charges for preparing the memorial of the deed of conveyance for registration in a register county and registering it.(f)

In the absence of a prior written agreement, the taxing master is bound to tax according to scale in all cases where the scale is applicable, notwithstanding that an item bill has been delivered at the client's request.(g)

Rules.

1. The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots.

It has been held that the commission payable to a vendor's solicitor "for conducting the sale of property by public auction" (see *infra*, r. 11), is chargeable upon the total amount realised by the sale, even though the property be sold in lots, and though the lots be held by the vendor under different titles, and be sold to different purchasers.(h) In another case,

(a) *Re Earnshaw-Wall*, (1894) 3 Ch. 156; 63 L. J. 836, Ch.; 71 L. T. Rep. N. S. 173; 42 W. R. 567.

(b) *Ante*, p. 601.

(c) *Ex parte Mayor of London*, 34 Ch. Div. 452, 456, 458; 56 L. J. 308, Ch.; 56 L. T. Rep. N. S. 13; 35 W. R. 210.

(d) *Welby v. Still*, (1894) 3 Ch. 641; 63 L. J. 931, Ch.; 43 W. R. 73.

(e) *Re Furber*, (1898) 2 Ch. 538; 67 L. J. 593, Ch.; 79 L. T. Rep. N. S. 266.

(f) *Grey v. Curtice*, 68 L. J. 60, Ch.; 79 L. T. Rep. N. S. 713; (1899) 1 Ch. 121, C. A.

(g) *Re Negus*, (1895) 1 Ch. 73; 64 L. J. 79, Ch.; 71 L. T. Rep. N. S. 716; 43 W. R. 68.

(h) *Re Onward Building Society*, (1893) 1 Q. B. 16; 62 L. J. 80, Q. B.; 68 L. T. Rep. N. S. 443; 41 W. R. 107.

however, where a solicitor acted for the purchaser of several small lots of land all purchased at the same time, though not from the same vendor, at prices varying from 100*l.* to 10*l.*, the several lots being comprised in one mortgage, but each having a separate and distinct title, and a separate abstract for each being delivered, it was held that the solicitor was entitled under rule 8 (*infra*) to the minimum charge of 5*l.* or 3*l.* for each lot, and was not restricted to one charge for the business as a whole.(a)

And recently it has been decided that where freeholds held under one title were sold by auction in lots, and separate abstracts delivered to the respective purchasers, the sale of each lot is a separate transaction within rule 8 (*infra*), and consequently the prescribed remuneration to which the solicitor for the vendor is entitled is 3*l.* in respect of each transaction under 100*l.*(b)

2. The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted he is to charge according to the present system, as altered by sched. 2 hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are to be subject to rule 11.

3. Where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges and one-half of those which would be allowed to the mortgagor's solicitor up to 5000*l.*, and on any excess above 5000*l.*, one-fourth thereof.

4. If a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is to be entitled to charge 2*l.* additional for each such party after the first.

5. Where a party, other than the vendor or mortgagor, joins in a conveyance or mortgage, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by sched. 2. hereto.

6. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half the above fees for investigating title, and preparing the mortgage deed up to 5000*l.*, and on any excess

(a) *Re Margetts*, (1896) 2 Ch. 263 ; 74 L. T. Rep. N. S. 309 ; 44 W. R. 462.

(b) *Re Thomas*, 69 L. J. 219, Ch. ; (1900) 1 Ch. 454.

above 5000*l.*, one-fourth thereof, in addition to his full charges upon the purchase money and his commissions for negotiating (if any).

7. Fractions of 100*l.*, under 50*l.*, are to be reckoned as 50*l.* Fractions of 100*l.*, above 50*l.*, are to be reckoned as 100*l.*

8. Where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be 3*l.*

See on this rule *Re Margetts* and *Re Thomas*, stated *ante*, p. 605.

9. Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption.

This rule applies also where the sale is by a second mortgagee, under his power of sale, subject to the first mortgage.(a)

10. The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the present system as altered by schedule 2 hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable.

11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solicitor it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

Under this rule it has been held that the word "commission" is to be read in a general way, and means where no payment in respect of conducting the sale is made by the client to the auctioneer. Therefore, where solicitors on a sale of property by auction conducted all the business connected with the sale except taking the bids in the auction room, for which they paid the auctioneer two guineas for each lot sold, and one guinea for each lot unsold, and then claimed both the amount paid to the auctioneer and the scale fee for conducting the sale, it was held that the payment to the auctioneer was a commission under the above rule, and that the solicitors were not entitled to charge for remuneration under the scale. In order that the scale fee may apply, the auctioneer's charges must not fall upon

(a) *Fortescue v. Mercantile Bank*, (1897) 2 Q. B. 236; 45 W. R. 529; 66 L. J. 591 Ch.; 76 L. T. Rep. N. S. 645.

the client.(a) But in case the auctioneer is paid by the client, rule 11 does not deprive the solicitor of all remuneration; he is still entitled to a *quantum meruit* for the work, regulated according to the old system as altered by schedule 2.(b)

An *ad valorem* charge paid by a purchaser to a surveyor appointed by the vendor as agent to treat was held to be a commission, and to disentitle the solicitor employed from charging the scale fee for negotiating a sale by private contract.(c)

As to the exception contained in Rule 11, see *Re Burdekin*.(d)

12. In cases where, under the previous portion of this schedule, a solicitor would be entitled to charge a commission for negotiating a sale or mortgage, or for conducting a sale by auction, and he shall not charge such commission, then he shall be entitled to charge the rates allowed by the first column on all transactions up to 2000*l.*, and to charge in addition those allowed by the second column on all amounts above 2000*l.*, and not exceeding 5000*l.*, and further to charge those allowed by the third column on all amounts above 5000*l.*, and not exceeding 50,000*l.*, instead of the rates allowed up to the amounts mentioned in those columns respectively.

PART II.

Scale of Charges as to Leases, or Agreements for Leases, at Rack Rent (other than a Mining Lease, or a Lease for Building Purposes, or Agreement for the same.)

Lessor's solicitor for preparing, settling, and completing lease and counterpart :—

Where the rent does not exceed 100 <i>l.</i>	{ 7 <i>l.</i> 10 <i>s.</i> per cent. on the rental, but not less in any case than 5 <i>l.</i>
Where the rent exceeds 100 <i>l.</i> and does not exceed 500 <i>l.</i>	{ 7 <i>l.</i> 10 <i>s.</i> in respect of the first 100 <i>l.</i> of rent, and 2 <i>l.</i> 10 <i>s.</i> in respect of each subsequent 100 <i>l.</i> of rent.
Where the rent exceeds 500 <i>l.</i>	{ 7 <i>l.</i> 10 <i>s.</i> in respect of the first 100 <i>l.</i> of rent, 2 <i>l.</i> 10 <i>s.</i> in respect of each 100 <i>l.</i> of rent up to 500 <i>l.</i> , and 1 <i>l.</i> in respect of every subsequent 100 <i>l.</i>
Lessee's solicitor for perusing draft and completing.	{ One-half of the amount payable to the Lessor's solicitor.

The costs of the lessor's solicitor "for preparing, settling, and completing" an agreement for a tenancy for less than three years at a rack rent, are to be taxed according to the above scale, for it does not apply exclusively

(a) *Drielsma v. Manifold*, (1894) 3 Ch. 100; 63 L. J. 653, Ch.: 71 L. T. Rep. N. S. 62; 42 W. R. 578, C. A.; *Cholditch v. Jones*, (1896) 1 Ch. 42; 65 L. J. 83, Ch.; 73 L. T. Rep. N. S. 528; 44 W. R. 124.

(b) *Parker v. Blenkhorn*, 14 App. Cas. 1; 58 L. J. 209, Q. B.; 59 L. T. Rep. N. S. 906; 37 W. R. 401.

(c) *Re Harris*, 56 L. T. Rep. N. S. 477; W. N. (1887) 74.

(d) (1895) 2 Ch. 136; 64 L. J. 561, Ch.

to leases by deed. If there be a counterpart of a lease, the charge for that must be deducted from the scale fee when ascertained, for there is no liability on the part of the tenant to the landlord for the counterpart.(a)

The scale fee for "preparing, &c., lease and counterpart," includes the solicitor's remuneration in respect of negotiations which lead up to, and the preparation of the agreement, which precedes the lease, and he cannot make a further charge for these.(b) But the scale fee does not cover negotiations by the solicitor with persons other than the person to whom the lease is ultimately granted. For such negotiations the solicitor may charge under Rule 2 (c) of the general order (*supra*), as for business "which is not in fact completed."(c)

Where numerous leases are granted according to a printed form requiring in each case merely the date, the names of the parties, the parcels, a plan, the rent, and so forth, to be filled in, the solicitor is not entitled to the scale fee in part 2 of schedule 1 for any lease subsequent to the first, but only for the amount and value of the work actually done.(d)

In the above scale, "where the rent exceeds 100*l.* but does not exceed 500*l.*," it has been held that the words "per cent." were intentionally not included before the 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent. Therefore the lessor's solicitor is not entitled to charge any percentage on fractional amounts of 100*l.*, where the rental exceeds 100*l.*(e)

Scale of Charges as to Conveyances in Fee, or for any other Freehold Estate Reserving Rent, or Building Leases Reserving Rent, or other Long Leases not at Rack Rent (except Mining Leases), or Agreements for the same respectively.

Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart:—

Amount of Annual Rent.	Amount of Remuneration.
Where it does not exceed 5 <i>l.</i>	5 <i>l.</i>
Where it exceeds 5 <i>l.</i> and does not exceed... 50 <i>l.</i>	(The same payment as on a rent of 5 <i>l.</i> , and also 20 per cent. on the excess beyond 5 <i>l.</i>
Where it exceeds 50 <i>l.</i> and does not exceed... 150 <i>l.</i>	(The same payment as on a rent of 50 <i>l.</i> , and 10 per cent. on the excess beyond 50 <i>l.</i>
Where it exceeds ... 150 <i>l.</i>	(The same payment as on a rent of 150 <i>l.</i> , and 5 per cent. on the excess beyond 150 <i>l.</i>

(a) *Re Negus*, (1895) 1 Ch. 73; 64 L. J. 79, Ch.; 71 L. T. Rep. N. S. 716; 43 W. R. 68.

(b) *Savery v. Enfield Local Board*, (1893) A. C. 218; 62 L. J. 674 Ch.; 68 L. T. Rep. 722; 42 W. R. 33.

(c) *Re Martin*, 41 Ch. Div. 381; 58 L. J. 478, Ch; 60 L. T. Rep. N. S. 555; 37 W. R. 479.

(d) *Welby v. Still*, (1895) 1 Ch. 524; 64 L. J. 495, Ch.; 72 L. T. Rep. N. S. 108.

(e) *Re McGarel*, (1897) 1 Ch. 400; 76 L. T. Rep. N. S. 70.

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for } One-half of the amount payable to
perusing draft and completing. } the vendor's or lessor's solicitor.

RULES APPLICABLE TO PART II. OF SCHEDULE I.

As to all Leases, or Conveyances at a Rent, or Agreements for the same, other than Mining Leases and Agreements therefor.

1. Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II.

2. Where a solicitor is concerned for both vendor and purchaser, or lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges and one-half of that of the purchaser's or lessee's solicitor.

3. Where a mortgagee or mortgagor joins in a conveyance or lease, the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

4. Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

5. Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

Where a lease is granted for the considerations named in rule 5 (*supra*), the lessor's solicitor is entitled to the above fee in respect of the premium, though no abstract of the lessor's title has been furnished.(*a*) But where the lease was to a company and the premium consisted of a number of its shares, it was held that rule 5 did not apply.(*b*)

6. Fractions of 5*l.* are to be reckoned as 5*l.*

SCHEDULE II.

INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS,
AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be

For drawing	...	...	...	...	...	...	2 <i>s.</i> per folio.
For engrossing	...	...	...	...	...	...	8 <i>d.</i> „ „
For fair copying	...	...	...	...	...	...	4 <i>d.</i> „ „
For perusing	...	...	...	...	...	...	1 <i>s.</i> „ „

ATTENDANCES.

							<i>s.</i>	<i>d.</i>
In ordinary cases	...	...	...	...	...	...	10	0

(*a*) *Re Robson*, 45 Ch. Div. 71 ; 59 L. J. 627, Ch. ; 63 L. T. Rep. N. S. 372 ; 38 W. R. 556.

(*b*) *Re Hasties and Crawford*, W. N. (1888) 95 ; 36 W. R. 572.

In extraordinary cases the taxing master may increase or diminish the above charge, if for any special reasons he shall think fit.

ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALES).

								s.	d.
Drawing each brief sheet of 8 folios	...	...	...	...	...	...	...	6	8
Fair copy	...	...	...	...	...	...	...	3	4

JOURNEYS FROM HOME.

								£	s.	d.
In ordinary cases for every day of not less than seven hours										
employed on business or in travelling	...	...	...	...	...	...	...	5	5	0
Where a less time than seven hours is so employed, per hour								0	15	0

In extraordinary cases the taxing master may increase or diminish the above allowance, if for any special reasons he shall think fit.

The words "other documents" in the heading to sched. 2 does not include abstracts of title; therefore the fee for perusal thereof will still be the old scale of 6s. 8d. for every three brief sheets.(a) But it includes a case for the opinion of counsel, and the taxing master is wrong in allowing only 1s. per folio as the ordinary fee for drawing such a case.(b)

A mere formal attendance of the solicitor or his clerk, such as delivering papers at counsel's chambers, is not an "attendance" within the meaning of sched. 2; and the allowance on taxation of 3s. 4d. for such an attendance is correct.(c)

(a) *Re Parker*, 29 Ch. Div. 199; 52 L. T. Rep. N. S. 686; 33 W. R. 541.
(b) *Re Mahon*, (1893) 1 Ch. 507; 62 L. J. 65, Ch.; 68 L. T. Rep. N. S. 189; 41 W. R. 257.
(c) *Re Mahon*, sup.

CHAPTER XIV.

THE LAND TRANSFER ACTS 1875 AND 1897, AND RULES AND ORDERS ISSUED THEREON FOR THE REGISTRA- TION OF TITLE TO LAND.

INTRODUCTION.

By the Land Transfer Act of 1875, a voluntary system of registration of title to land was established for England and Wales. By the Land Transfer Act of 1897 and the Land Transfer Rules of 1898, the Act of 1875 has been added to, amended, and in parts repealed; and by sect. 20 of the Act of 1897, power is given to Her Majesty, after notice to and subject to a veto by, the County Council, to declare that registration of title shall be compulsory on sale in any county or part of a county to which the order may apply. This Act came into operation on the 1st January 1898, so far as voluntary registration is concerned. And by an Order in Council of the 18th July 1898 and an Amendment Order in Council of the 28th November 1899, compulsory registration on sale has been applied to the County of London, but so that as regards the several and respective portions of the county specified in the schedule to the order and amendment order, the operation thereof is to commence only on the several dates therein specified. Copies of these orders are given in a subsequent page.

A body of new rules have, in pursuance of the power given by the Acts, been issued, and are now in operation.

In treating of these Acts and rules the order observed in the following pages, save as to compulsory registration, is that of the Act of 1875. placing the several sections of the Act of 1897 (with the exceptions of sects. 1 to 5, which are of general application), and the rules, with the particular sections of the Act of 1875 to which they apply. In some cases, however, certain sections of the latter Act have, when more convenient for reference, been transposed, and again briefly stated in the order in which they occur in the Act itself. By this mode constant cross references are avoided.

The various sections of the Acts and the rules have in many instances been abridged, without, it is trusted, affecting their force in any way.

THE ACTS AND RULES.

PRELIMINARY.

What Lands may be Registered.

Freehold and Leasehold.—By sect. 2 of the Act of 1875 (38 & 39 Vict. c. 87) land shall not be registered under the Act unless it is (1) of freehold tenure, or (2) is leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure; but customary freehold, where admission or any Act by the lord of the manor is necessary to perfect the title of a purchase from the customary tenant, shall not be deemed to be land of freehold tenure.

Sect. 2 must be read in connection with sects. 11 and 82 of the Act of 1875, and with sect. 18 of the Act of 1897 (60 & 61 Vict. c. 65) and schedule thereto. Sect. 11 of the Act of 1875 (*post*) shows that the shortest leasehold that can be registered is one of which more than twenty-one years are unexpired. See also sect. 20 of the Act of 1897, stated *post*.

Advowsons and other special hereditaments.—By sect. 82 of the Act of 1875 (as amended by the Act of 1897, sched. 1), the registrar may register the proprietor of any advowson, rent, tithes impropriate, or other incorporeal hereditament of freehold tenure, also the proprietor of any mines or minerals where severed from the land, &c.

The registrar may also register any fee farm grant or other grant reserving rents or services to which the fee simple estate in any freehold land about to be registered, or registered, may be subject, with particulars of the land or services, and the conditions annexed thereto, and any record so made is conclusive as to the rents, &c., recorded.

This section, after the word “tenure,” contained the words “enjoyed in gross,” but by the Act of 1897, sched. 1, these words are repealed. (See also Act, 1897, sect. 24 (1), stated *infra*.)

The application for registration of advowsons, &c., is to be made in the usual manner (see *post*), subject only to any necessary modifications therein. In the case of a manor, a plan of the freehold demesne lands, if any, is to be left. So in the case of a rent or tithes, or rent charge in lieu of tithes, the applicant must leave with the application a plan of the lands out of which they issue, or such other information as will identify such lands on the ordnance map. (Land Transfer Rules, 1898, rr. 61 to 63.)

Lands of different tenures.—By the Act of 1875, sect. 67, and Land Transfer Rules, 1898, (a) r. 73, where it is uncertain whether land proposed to be registered is freehold or copyhold, from being intermixed and undistinguishable, a note to that effect is to be entered in the

(a) Subsequently referred to as L. T. R. 1898, or as R.

register, and that the registration is made without prejudice to any right that may arise if it is subsequently ascertained that the land is of copyhold tenure, which will remain unaffected by the registration.

By the Act of 1897, sched. 1, if land is found to have been registered with absolute or qualified title contrary to the provisions of sect. 2 of the Act of 1875, the registration is not to be annulled, but is to be deemed to be an error not capable of rectification, and any person suffering loss thereby is to be indemnified accordingly. As to rectification of register, &c., see *post*, sects. 95 to 97 of the Act of 1875, and sect. 7 of the Act of 1897. See also sect. 24 of the latter Act, stated *infra*.

By sect. 3 of the Act of 1875, the Act was to come into operation on 1st January, 1876. This section is, however, repealed by the S. L. R. Act, 1893 (No. 2).

The Register.

By L. T. R. 1898, r. 2, the register is to consist of three portions, called (1) the property register, (2) the proprietorship register, and (3) the charges register. The title to each registered property is to bear a distinguishing number. (See also r. 3, *et post*.)

When pieces of land are added to or removed from the property, this fact is, where practicable, to be noted in the property register and plan (r. 4).

The proprietorship register states whether the title is absolute, qualified, or possessory, &c. (r. 6).

Charges and incumbrances may, if the registrar thinks fit, be entered in a separate book (r. 8; see also r. 7).

On compulsory registration the register is to be bound in volumes according to parishes, &c. (r. 9). So any landowner may have the register of his title bound in a separate volume, on terms (r. 11).

Separate index maps of freehold and leasehold land are to be kept in the registry; and of lands affected by the registration of incorporeal hereditaments. An index of proprietors' names, and a list of pending applications for registration, are also to be kept (rules 12, 13). But the index of proprietors' names is open to the inspection of the registered proprietors only; however, the registrar may allow the trustee in bankruptcy, or like person interested generally in the proprietor's property, to inspect that index (r. 14).

Construction of Terms.—By sect. 4 of the Act of 1875, unless there is something inconsistent in the context, "Person" includes a corporation and any body of persons unincorporate:

"Registrar," "court," and "general rules" mean such "registrar," "court," and "general rules," as are in this Act respectively in that behalf mentioned:

"Prescribed" means prescribed by any general rules made in pursuance of this Act:

"The Court of Chancery," and "Court of Appeal in Chancery," and "Her Majesty's Superior Courts," include any courts in which the powers of the Courts so referred to by name may be for the time being vested:

See also sects. 114 and 115, and rule 234, stated *post*.

The definition of land contained in the Act of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter twenty-one, intituled "An Act for shortening the language used in Acts of Parliament," shall not apply to this Act.

By the Act of 1897, sect. 24 (1), all hereditaments, corporeal and incorporeal, are to be deemed land within the meaning of the Act of 1875 and this Act, except that nothing is to render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than 40 years to run or two lives to fall in, or to an undivided share in land, or to freeholds intermixed and undistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale thereof. (See hereon, *post.*)

By sub-sect. 2 "personal representative" means an executor or administrator.

And by sect. 26, this Act is to be construed as one with the Act of 1875.

ENTRY OF LAND ON REGISTER OF TITLE.

(1.) *Freehold Lands.*

Who may apply.—By sect. 5 of the Act of 1875 the following persons; (that is to say,)

- (1.) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and
- (2.) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and
- (3.) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether subject or not to incumbrances,

may apply to be registered, or to have registered in his stead any nominee or nominees as proprietors or proprietor of such freehold land with an absolute title or with a possessory title only: Provided, that in the case of land contracted to be bought the vendor consents to the application. (See also other instances stated *post*, under "Settled Land" and "Small Holdings.")

By sect. 6, where an absolute title is required the applicant or his nominee is not to be registered as proprietor of the fee simple until the title is approved by the registrar. But where a possessory title only is required the applicant or his nominee may be registered as proprietor of the fee simple on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed.

Estate with absolute title.—By sect. 7 of the Act of 1875 the first registration of any person as proprietor of freehold land (in the Act referred to as first registered proprietor), with an absolute title, vests in him an estate in fee simple therein, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

- (1.) To the incumbrances, if any, entered on the register; and

(2.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by the Act declared not to be incumbrances; and

(3) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty.

Settled Land.—Sub-sect. 3 of sect. 7, must be read in connection with sects. 49, 58, and 68 of the Act, and with sect. 6 of the Act of 1897, and rules made thereunder. By L. T. R. 1898, r. 68, application for registration of settled land may be made by any person capable of being registered as proprietor, with the consent of the other persons (if any) whose consent or concurrence is necessary to a sale by that person. And by sect. 6 (1) of the Act of 1897, settled land may, at the option of the tenant for life, be registered either in his name, or, where there are trustees with powers of sale, in their names, or, where there is an overriding power of appointment of the fee simple, in the names of the persons in whom it is vested (sub-sect. 1). Such restrictions or inhibitions as are necessary for the protection of the rights of persons beneficially interested in the land are also to be entered (sub-sect. 2; and see instances, *post tit.*, “Forms in Schedule 1 to Rules,” forms 6, 7, 8). By r. 69, in the case of an application for registration with a possessory title, the proper restriction must be left with the application, or the registrar furnished with such information as will enable him to draw the proper restriction.

A restriction is a mode used for checking the action of the registered proprietor when necessary and proper. (a) An inhibition is in the nature of an injunction, granted by the court or registrar. (b) By r. 70, in framing these restrictions and inhibitions it is not the duty of the trustees or of the registrar to protect the interests of any person who would not have been a necessary party to a sale or mortgage of the land if it had been unregistered; but the trustees, or, if none, the registrar, must give notice of the restrictions and inhibitions to such of the beneficiaries as the registrar directs, who may (at his own risk) lodge a caution or apply for an inhibition. (c)

Under sects. 49 and 53 of the Act of 1875, a beneficiary may also protect his interest by lodging a caution against the registered proprietor dealing with the land until notice be given to him. (d)

The Act of 1897, sect. 6 (1, 2), and rules deal, it will be seen, with putting settled land on to the register. It yet remains to show how registered land may be put into settlement.

(a) See 38 & 39 Vict. c. 87, ss. 58 and 59; 60 & 61 Vict. c. 65, Sched.; L. T. R. 1898, r. 196; *et post.*

(b) See 38 & 39 Vict. c. 87, ss. 53, 57; L. T. R. 1898, rr. 194, 195; *et post.*

(c) See forms in schedule to rules 6 to 10.

(d) See also L. T. R. 1898, rr. 188 to 192, *et post.*

By sect. 6 (3) of the Act of 1897, where registered land is assured to the uses of a settlement, the instrument of transfer operates as a conveyance to the uses of the settlement, and the trustees thereof must concur in the instrument, and apply for the entry on the register of the proper restrictions or inhibitions. If there are no such trustees the registrar is to enter the proper restrictions or inhibitions.

By r. 81 a transfer of land to the uses of a settlement is to be in one of the forms 16 to 22 in sched. 1 to the rules, with the addition of the proper inhibitions or restrictions to be entered on the register. (Form 16 is given *post tit.*, "Forms in Sched. 1 to Rules.")

By the Act of 1897, sect. 6 (4), on the death of the tenant for life, registered as proprietor of settled land, the trustees of the settlement, if any, are to apply for the registration of his successor or successors, with such restrictions or inhibitions as may be necessary. If the trustees make default herein, or if there are no such trustees, the registrar is to proceed under sect. 41 of the Act of 1875 (which provides for transmission, on death, of freehold land), and as is prescribed by L. T. R. 1898.

By r. 132, when the trustees apply, they and their solicitor must make a statutory declaration of the fact of the death of the tenant for life, that they are the trustees, and that the person for whose registration they are applying is the successor under the settlement, and as to any necessary restrictions and inhibitions. See also rules 133, 134, as to other evidence.

By rule 135, if the trustees make default, or if there are no trustees, then any person interested under the settlement may apply for registration of a new proprietor; and the registrar will make inquiry into the terms of the settlement, settle the draft entries, and give notice to the trustees (if any) and to the successor, &c., and, if no valid objection is made thereto, will enter the new proprietor accordingly.

And by the operation of sect. 6 (5) of the Act of 1897, and rule 131, when a settlement is created by the will of, or otherwise arises in consequence of the death of, a sole registered proprietor, the personal representative must, with the consent of the tenant for life (if of full age), apply for registration of the proper person as proprietor. The probate or letters of administration must also be left with the proper restrictions and inhibitions.

By the Act of 1897, sect. 6 (7), the registered proprietor of settled land and all other necessary parties must at the request and expense of a person entitled to an estate, &c., created for securing money actually raised, charge the land therewith. For instance, the mortgagee of the portions term under the settlement might so request.

To prevent a security for moneys presently raisable under a puisne charge gaining priority by earlier registration over a security for moneys raisable at a future time under a paramount charge (as when moneys are raised under a later portions term, while moneys raisable under an earlier portions term are still unraised), a registered proprietor charging settled land under the above sub-section must note on the instrument of charge the existence of any prior term or power under which moneys have been raised, which will, when raised, have priority over moneys secured by

the puisne charge, referring to the instrument creating the term, &c., and stating the amount raisable. The note is to be entered in the register. (R. 117.)

Although settled land may be registered as above shown, and the settlement, or an abstract or copy thereof, may be filed in the registry for safe custody and reference, it is not to be referred to in the register, and is to be filed separately. And neither the registrar nor any person dealing with registered land or a charge is to be affected with notice of its trusts, express, implied, or constructive; and such person is not so entitled to call for production of the settlement, or for information as to its contents. And reference to trusts are, as far as possible, to be excluded from the register.^(a)

By sect. 6 (8) of the Act of 1897, subject to the maintenance of the right of the registered proprietor to deal by registered disposition, or by way of mortgage by deposit, with the registered land, the estates, rights, and interests of the persons entitled under any settlement of the land are to be unaffected by the registration of that proprietor.

By sect. 6 (10), the expression "tenant for life," "settled land," "settlement," and "trustees of the settlement" have the same meaning as in the Settled Land Acts 1882 to 1890.

As to the meaning of these terms, see *ante*, pp. 286, 411, 412.

It will be observed that by sect. 2 of the Act of 1875, land is not to be registered unless it be freehold or leasehold, &c. However, by sect. 2 (1) of the Settled Land Act, 1882, "settlement" includes (*inter alia*) any covenant to surrender, copy of court roll, &c., and by sub-sect. 3, land which is the subject of a settlement is settled land. Therefore, it would seem that sect. 6 (10) of the Act of 1897 brings copyholds, when the subject of a settlement, within this part of the Act. But the general scope of the Acts of 1875 and 1897 is against this contention.

Prior to sect. 6 of the Act of 1897, and the rules above set out, the Act of 1875, sects. 58 and 59, were, in conjunction with sect. 68, utilised for the purpose of putting registered land into settlement. By sects. 58 and 59, the registered proprietor of land is enabled to place on the register restrictions on transferring or charging the land, without the giving of the notices or consents specified in the section, as will be seen on reference thereto, set out *post*. And by sect. 68, any person having a power of selling land may authorise the purchaser to make an application to be registered as first proprietor, &c.; or, may himself apply to be so registered as such proprietor, with the consent of the persons (if any) whose consent is required to the exercise of the power of sale, &c. Therefore, such person might get himself registered as proprietor, with restrictions as to sales, &c., as in a settlement.

By rule 82, where registered land has been brought into settlement, and the existing registered proprietor is the tenant for life under the settlement, and elects to remain the registered proprietor, he must apply for

(a) See 60 & 61 Vict. c. 65, s. 6 (6), and Sch.: L. T. R. 1898, r. 72; repealing sub-sect. 1 of sect. 83, of 38 & 39 Vict. c. 87.

the registration of a restriction and inhibition in form 6 in sched. 1 to the rules, or as required.

Part owners may also apply for registration. By sect. 69 of the Act of 1875, any two or more persons entitled for their own benefit concurrently or successively, or partly in one mode and partly in the other, to such estates, rights, or interests in land as together would, if vested in one person, entitle him to be registered as proprietor of the land, may apply to be registered as joint proprietors in the same manner and with the same incidents, so far as circumstances admit, in and with which it is in the Act declared that an individual proprietor may be registered (see also sects. 41 and 42, *post*). This section, after the word "land," contains the words "subject as in this Act mentioned as to the number of persons to be registered in respect of the same land." But by the Act of 1897, s. 14, it is provided that so much of sect. 83 of the Act of 1875 as prohibits the registration of undivided shares, and limits the number of co-proprietors, &c., is repealed. Therefore, the above quoted words have no longer any force.

Unless the joint proprietors on applying to be registered show that they are entitled to the land or charge for their own benefit, or that under their trust instrument a sole surviving trustee can dispose of the same, the registrar is to make an entry on the register in form 52 in sched. 1, that when the number has been reduced to one no registered disposition of the land or charge shall be made except under the order of the court, or of the registrar after inquiry into the title, subject to an appeal to the court (Act 1875, s. 83 (3); Act 1897, sched. 1; R. 185; form 52). By r. 186 this entry may at any time be made on the request of the joint proprietors. By r. 187, when such an entry has been made and the number is so reduced, the registrar must, before entering a disposition by the registered proprietor, require the production of the equitable title, and may give the equitable owner notice.

Under the above sections and rules a sole trustee may be prevented from dealing with the property.

By the Act of 1897, s. 24 (1), registration of an undivided share in land is not to be compulsory.

Husband and Wife.—By the Act of 1875, s. 44, as amended by the Act of 1897, sched. 1, the husband of any female registered proprietor of freehold land, unless married on or after 1st January, 1883, or unless it is property to which she is entitled for her separate use,^(a) may apply to be registered as co-proprietor with her, but he is to be so described on the register; and if he predeceases her, the original registry of the wife, with a change, if necessary in the name, revives subject to any registered disposition by them. By sect. 45, amended as above, the husband of any female registered proprietor of leaseholds or of a charge, unless married after the above date, &c., may apply to be registered as proprietor in her place.

Small Holdings Act.—By sect. 10 of the Small Holdings Act, 1892, where a county council have purchased land under the Act, they are to

(a) See *ante*, pp. 15, 403, 404.

apply for registration as proprietors with an absolute title under the Land Transfer Act, 1875; but by the Land Transfer Act of 1897, s. 19 (1), they may be registered as proprietors of the land with any such title as is authorised by the Act of 1875. See sub-sect. 2 as to a transfer of the land.

The rules regulating the practice as to the county council so applying for registration with an absolute title are those dated 9th August, 1892, which are still in force, and contain a schedule of forms. But as the County Council may now apply for registration with a possessory title only, the Rules of 1898 will also apply.

As to what liabilities, &c., are declared not to be encumbrances, see sect. 18, as amended by the Act of 1897, sched. 1, stated *post*.

Estate with possessory title.—By sect. 8 of the Act of 1875, registration of the first registered proprietor of freehold land with a possessory title only is not to affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of his title, and subsisting or capable of arising at the time of registration, but, save as aforesaid, has the same effect as registration with an absolute title. See also L. T. R. 1898, r. 18, to the same effect, stated *post*.

Qualified title.—By sect. 9, where an absolute title is required, and on examination thereof it appears to the registrar that the title can be established only for a limited period, or subject to certain reservations, he may, on the applicant's request, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date, or under a specified instrument or otherwise particularly described in the register, and a title so registered is called a qualified title, which is to have the same effect as registration with an absolute title, save that it is not to affect or prejudice the enforcement of any estate, right, or interest so excepted.

Land certificate.—Sect. 10, as amended by sect. 8 of the Act of 1897, applies to land certificates, and is stated *post*.

Mode of First Registration of Freeholds.

As already stated (*ante*, p. 614), where an absolute title is required, the applicant's title must be approved by the registrar, but if a possessory title only is required the registration may be made after production of such evidence of title and giving such notices as may be prescribed. By L. T. R., 1898, r. 2, in the case of corporeal hereditaments a plan of the land must be filed in the registry.

Possessory Title.

How to apply.—By L. T. R., 1898, r. 17, an application for registration with a possessory title must be made by delivering at the registry a written application according to form 1 in sched. 1 of the rules, accompanied by (A) a conveyance on sale to the applicant(a) or (B) a

(a) That is when the applicant is a purchaser.

statutory declaration by the applicant or his solicitor according to form 2 in sched. 1 of the rules, accompanied by the latest document of title (if any) in the possession or under the control of the applicant. In either case the application must contain sufficient particulars, by plan or otherwise, to enable the land to be identified on the ordnance map.^(a) If the application is in the name of a nominee, or of a purchaser, the written consent of the nominee or of the vendor or his solicitor must also be left with the application (R. 17; Act 1897, s. 14). And in the case of a purchase, a copy, on stout foolscap paper, of the conveyance and plan must also be left (Lake's Instr.). The boundaries of the land must be shown by an edging of red colour (R. 210). The amount of the *ad valorem* stamp and land registry fee stamps must also be left (Act 1875, s. 83 (7); R. 164, 263).

It is not necessary to state in the application whether the property is subject to incumbrances or conditions. But with a view to future dealings with the property, it is considered advisable to mention them; and if so they will be referred to in the charges register. (R. 18.)

However, the title will not be investigated by the registrar (r. 18); for registration with a possessory title only will not prejudice the enforcement of any estate, right, or interest adverse to the title of the first registered proprietor, subsisting, &c., at the time of registration, though appearing on the register (Act 1875, s. 8; R. 18; *et ante*, p. 619).

It will be seen that no abstract of title is required by the foregoing rules when a possessory title is required; but by rule 253 the registrar may require an abstract or concise statement of any deeds or documents delivered at the registry for perusal in the course of any registration proceeding, to be furnished and verified.

And under sect. 71 of the Act of 1875, the registrar has the power to compel the production of deeds, &c., as shown, *post*.

Registration and certificate.—When an application complying with rule 17 (*supra*) has been delivered, and the entries and plan settled, the registration is to be effected as of the day on which and in the priority in which the application was delivered at the registry; and the land certificate (stating the title to be possessory) is prepared and handed to the applicant, or, if he prefers it, deposited in the registry. If so deposited, it will be officially indorsed from time to time with notes of subsequent entries in the register affecting the land. The registered proprietor may at any time apply for the delivery of the certificate to himself, and may at any time again deposit it in the registry. But where the land certificate is outstanding it must be produced to the registrar to be indorsed as above (see Act 1875, s. 10; Act 1897, s. 8; R. 19). A land certificate is to be in form 61, sched. 1, to the rules (r. 204); see also rr. 205-208, *et post tit.*, "Transfer of freehold land," for further information as to certificates.

Marking deeds with notice.—If a deed or document of title is delivered with the application it is to be marked with notice of the registration, &c.,

(a) As to maps and verbal descriptions of land, see Rules 209 to 221.

and at the applicant's option, either retained in the registry or delivered to him; a copy or abstract thereof for filing being furnished by him if required (r. 20).

Under sect. 72 of the Act of 1875, the registrar, before registration, may require the applicant to produce such documents of title as will when marked give notice to a purchaser, &c., of the fact of registration. But by the Act of 1897, sched. 1, and r. 21, in case of registration with a possessory title, where the deeds produced to be marked are numerous, the registrar may act upon a statutory declaration by the applicant's solicitor that all the lands included in the application are dealt with by the deeds produced, and that they are all the deeds necessary to be marked for the purpose of giving notice, &c. See also rules 22, 23, and 24, the latter of which applies to the removal of the land from the local registry of Middlesex or Yorkshire.

By rule 203, on the first registration of land, and on subsequent changes of proprietorship, the registrar must, whenever practicable, enter in the register and on the land certificate the price paid or value declared.

Absolute Title.

How to apply.—By rule 25 the written application for registration with an absolute title is to be according to form 3 in sched. 1 to the rules, and must state the county and parish or place in which the land is situate, and the name of the estate, or other short particulars sufficient to identify it.

Where the application for registration is in the name of a nominee, or is made by a purchaser, the written consent of the nominee, or of the vendor or his solicitor, must be also delivered (rule 27).

Examination of title.—The title must be first examined by the registrar (*ante*, p. 614), therefore, with the application must be delivered an abstract of title in the usual form, together with all such deeds and documents relating to the title as the applicant has in his possession or power, including opinions of counsel, abstracts, contracts or conditions of sale, requisitions, replies, &c., and a schedule of such documents, also a list of the tenants and occupiers of the land. A time and place must be appointed for production of necessary documents not so delivered (Act 1875, s. 17; R. 29). As a rule a forty years' title should be shown; but as will be shown subsequently, the registrar has power to hear and determine objections to the title.

And by sect. 70 of the Act of 1875, where an examination of title is required, the *vendor* and his solicitor, where the applicant is a purchaser, and in all other cases the applicant for registration and his solicitor, must each, if required by the registrar, make an affidavit or a statutory declaration that to the best of his knowledge and belief all deeds and instruments of title, and all charges and incumbrances affecting the title, and all facts material thereto, have been disclosed, &c. By rule 41 the statutory declaration must be in form 5 in sched. 1 to the rules.

And by sect. 71 of the Act of 1875, if a person has in his possession or

custody any deeds or instruments of title to the land, to the production of which the applicant or his trustee is entitled, the registrar has power to order their production, subject to an appeal to the court. The section also makes provision for the enforcement of the order.

And by sect. 72, deeds are, if required by the registrar to be produced, to be marked with notice of registration, as already detailed.

The necessary searches and inquiries are to be made by such person and in such manner as the registrar directs (rule 30).

The title may be referred by the registrar for the opinion of one of the examiners of title, which includes the conveyancing counsel of the court (rules 31, 248). By rule 249 any person may object to the opinion of an examiner of title, whereupon the point will be decided by the registrar. By rule 31, where land has been sold by order of the court, or the title has been fully investigated on a recent purchase, the examination may be modified. See also rule 250.

So by sects. 74 & 75 of the Act of 1875, on the examination of the title to any land, the registrar may in case of doubt, either on a matter of law or fact, on the application of any party interested in the land, refer a case for the opinion of the high court, with power for the court to direct an issue of fact, to be tried by a jury. The opinion of the court is to be conclusive on the parties to the case, unless the court gives leave to appeal.

And under sects. 76 & 77, where infants, married women, lunatics, persons beyond seas or unborn, are interested in the land, any other persons interested therein may apply to the court for a direction that the opinion of the court to whom the case is referred shall be conclusively binding on such infants. &c. But see now the procedure under L. T. R. 1898, rr. 231 to 247; stated *post*, after sect. 114 of the Act of 1875, which will probably supersede sects. 74 and 75.

Advertisements.—The application for registration is to be advertised once in the *London Gazette*, and in such local and other newspapers, for such number of times, &c., as may be fixed by the registrar, giving the name and address of the applicant, a short description of the land, and the county and parish or place where situate, and requiring any objections to be made before the expiration of a stated period not less than two months from the latest advertisement (rule 32). And notices are to be served on tenants and occupiers and any other persons directed by the registrar (rule 34).

Restrictive conditions.—By the Act of 1875, s. 84 and R. 26, where land is about to be registered, or registered land transferred to a purchaser for value, there may be stated in or delivered with the application for registration a condition that the land or any part of it is not to be built upon or used in a particular manner, or other condition running with or capable of being legally annexed to land; and the first proprietor and every transferee, and every other person deriving title from him, is to be deemed to be affected with notice thereof. The condition may be modified or discharged by order of the court when beneficial to the persons principally interested in its enforcement. See also rule 40, stated *post*.

By the Act of 1897, schedule, conditions may be annexed at any time, and the section is to apply to any restrictive condition capable of affecting assigns by way of notice.

As to restrictive covenants and conditions, see *ante*, p. 140.

By rule 184, if the application to register such condition is not made on first registration or on a transfer, it must state the condition and be signed by the applicant, and if he is not the registered proprietor, by such proprietor also, and the signatures must be attested. A copy of the condition must also be left. See also rule 3.

Documents.—By rule 254, documents (other than maps or plans) to be filed in the registry must be printed, typewritten, lithographed, or written on stout foolscap paper, and allow a sufficient stitching margin.

And by rule 254 (A) every copy of a document delivered by a solicitor at the registry must be endorsed with his name and address, and be certified by him as a true copy; but it need not be stamped.

Objections to registration.—By sect. 17 of the Act of 1875, on the examination of any title due notice is to be given (*ante*, p. 622), and opportunity afforded to any persons desirous of objecting to do so; and by L. T. R. 1898, r. 35, any person may, by written notice signed by himself or his solicitor and delivered at the registry, object to the registration. The notice must state concisely the grounds of objection, and give the address within the United Kingdom of the person delivering it, and if delivered by the solicitor, must give the name and address of the person for whom it is given (rule 35). The registrar then gives notice thereof to the applicant, and the title is not to be registered as absolute until the objection is disposed of. (a) The applicant may obtain an appointment before the registrar to hear any objection, and must give the objector at least seven clear days' notice thereof; and if he fails to attend in person, or by counsel or solicitor, his objection is treated as withdrawn, unless the registrar allows another appointment (rule 36). The registrar may accept as evidence recitals, &c., twenty years old, and may determine the objections subject to an appeal to the court; and if he thinks the title will not be disturbed, may approve such title or require the applicant to apply to the court, upon a statement signed by the registrar, for its sanction to the registration (Act 1875, s. 17; see also Rules 31, 248, 249, set out *supra*, p. 622). (b)

If the objector desires to have an entry for his protection made in the register, he must proceed under rule 178, unless the applicant consents to the entry (rule 37). Rule 272 also provides for the determination by the registrar, after due notice and hearing, of any doubt or dispute arising on the investigation of the title or other proceeding on the registry.

Registration, &c.—When all requisitions and objections (if any) are disposed of, the proper entries for the register are to be drawn by the registrar and approved by the applicant or his solicitor; and at the

(a) As to notices, see Act 1875, ss. 89 to 92, and rr. 256 to 259, stated *post*.

(b) As to the court and appeal, see Act 1875, ss. 114 to 117, and rr. 231 to 247, *post*.

expiration of the time fixed by the advertisements and by any notices, and after the requirements of sects. 70 and 72 of the Act of 1875 (*ante*, p. 621) have been complied with, the registration is to be completed (rule 38).

All documents not required to be retained in the registry will be returned to the applicant or person who produced them; and if he declines to receive them the registrar may order their destruction (rules 38, 162, 252, 255).

The certificate is prepared, stating the title to be absolute, and is then dealt with as on a possessory title (Act 1875, s. 10; Act 1897, s. 8; R. 39), set out *ante*, p. 620.

Incumbrances, conditions, and other burdens to which the fee simple estate in the land may be subject are to be entered in the register according to the title produced, &c. (rule 40). As to incumbrances when a possessory title only is required, see *ante* p. 620.

And by the Act of 1897, sect. 13, on an application to register land with an absolute title, or to register a transmission of land, the registrar is to inquire as to succession duty and estate duty. And if it appears that there is or may be such liability to either as would affect the purchaser from the applicant for registration if the land were unregistered^(a) the registrar is to enter notice of the liability on the register. Succession duty and estate duty are not, (1) unless so noted; or (2) unless in the case of a possessory title, the liability to duty was at the date of the original registration of the land subsisting or capable of arising; or (3) unless in the case of a qualified title such liability was included in the exceptions made on the original registration, to affect a *bond fide* registered purchaser for value, although he may have received extraneous notice of such liability.

The above notice is entered in the charges register according to form 50 in sched. 1 to the rules (rule 171). The notice of liability must be cancelled on production of the evidence mentioned in rule 173, stated *post*. (R. 174 as amended by r. 8, June 29, 1899.)

The estate of the first registered proprietor with an absolute title is stated *ante*, p. 614.

An absolute title will be subject to rectification under sects. 95 to 97 of the Act of 1875, and s. 12 of the Act of 1897, stated *post*, "Rectification of Register."

Qualified Title.

It has already (*ante*, p. 619) been stated that where an absolute title is required which cannot be established, a qualified title may be registered; provided the applicant on being informed thereof makes a written request for the entry of such a title, whereupon the registrar frames the proper entries and obtains the applicant's approval of them, and then registers the qualified title (Act 1875, s. 9; R. 42.)

(a) See hereon, *ante*, pp. 103, 105.

(2.) *Leasehold Land.*

Who may apply.—By sect. 11 of the Act of 1875 a separate register is to be kept of leasehold land, and the following persons; that is to say,

- (1.) Any person who has contracted to buy for his own benefit leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired, whether subject or not to incumbrances; and
- (2.) Any person entitled for his own benefit, at law or in equity, to leasehold land held under any such lease as above described, whether subject or not to incumbrances; and
- (3.) Any person capable of disposing for his own benefit by way of sale of leasehold land held under any such lease as above described, whether subject or not to incumbrances;

may apply to be registered, or to have registered in his stead any nominee or nominees as proprietor or proprietors of such leasehold land, provided that in the case of a purchase the vendor consents to the application.

Leasehold land held under a lease containing an absolute prohibition against alienation cannot be registered; and if the lease contains a prohibition against alienation without the license of some other person, the land cannot be registered until and unless provision is made in the prescribed manner for preventing alienation without such license by entry on the register of a restriction to that effect, or otherwise. (See also r. 52, *post.*)

By the Act of 1897, sched. 1, a sub-lease is and a term created for mortgage purposes is not to be deemed a lease within the meaning of sect. 11. Therefore, in the case of a mortgage term there can be no registration under the Acts.

Sect. 12 of the Act of 1875 is repealed by L. T. R. 1898, r. 57 (see *infra*).

Estate of Leaseholder.—By sect. 13 of the Act of 1875, the registration of the first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held is to be deemed to vest in such person the possession of the land comprised in the registered lease relating to such land for all the leasehold estate therein described, with all implied or expressed rights, privileges, and appurtenances attached to such estate, but subject as follows:

- (1.) To all implied and express covenants, obligations, and liabilities incident to such leasehold estate; and
- (2.) To the incumbrances (if any) entered on the register; and
- (3.) Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate, and are by this Act declared not to be incumbrances in the case of registered freehold land; and
- (4.) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming

under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty.

As to what liabilities, &c., are declared not to be incumbrances, see sect. 18, as amended by the Act of 1897, schedule, stated *post*.

Sects. 14, 15, 16.—By L. T. R. 1898, r. 57, certain parts of sect. 11 of the Act of 1875, and sects. 12, 14, 15, and 16 of that Act are repealed, and are therefore omitted here. Under these sections the lessee registered his own title separately, with or without a declaration of the title of the lessor to grant the lease. But there was no provision made for the registration of the lessee's title as a possessory one, as there is by the L. T. R. 1898, as is shown *infra*. These rules assimilate the procedure on the registration of leaseholds to that of freeholds; and under them it will be noticed that no provision is made for the registration of leasehold land, with a declaration that the lessor had an absolute right to grant the lease under which the land is held. But by rule 47, registration of leasehold land with an absolute title has that effect; and rule 92 also gives the same effect to a transfer for value of leasehold land registered with an absolute or qualified title. These rules are stated *post*.

Mode of First Registration of Leaseholds.

How to apply.—By L. T. R. 1898, r. 43, the rules as to applications for registration of freehold land (*ante*, pp. 619, 621, 624) are to apply generally to applications for registration of leasehold land, subject to any necessary alteration in the forms; and the words “conveyance on sale” in rule 17 (A) is to be read as including a grant or assignment of a lease or sub-lease.

The lease, when in the applicant's possession or control, and in other cases a copy thereof, must be delivered with the application, which may be for registration with absolute or possessory title. But the land cannot be registered with an absolute title unless and until the title both to the leasehold and the freehold, and to any existing intermediate leasehold, is approved by the registrar (see Act 1875, s. 17, rules 44 to 47). If there be an existing intermediate leasehold, the words “lessor” and “lease” in the rules of 1898, and in sect. 13 (*ante*, p. 625) and sect. 35 (*post*) of the Act of 1875, are to apply to a sub-lessor and a sub-lease (rule 50).

Absolute Title.—The effect of registration of a person as first proprietor of leasehold land with an absolute title is to be that stated in sect. 13 of the Act of 1875, as the effect of registration with a declaration that the lessor had an absolute title to grant the lease under which the land is held (r. 47), stated *ante*, p. 625.

Possessory Title.—Registration of leasehold land with a possessory title is not to affect or prejudice the enforcement of any estate, right, or interest (whether in respect of the lessor's title or otherwise) adverse to the title of the first registered proprietor, and subsisting, &c., at the time

of such registration ; but save as aforesaid is to have the same effect as registration with an absolute title (rule 48).

Qualified Title.—Where an absolute title to leasehold land is required, and on examination it appears to the registrar that the title either of the lessor to the reversion, or of the lessee to the lease, can be established only for a limited period, or subject to reservations, the registrar may, on the applicant's written request, by entry in the register, except from the effect of registration the title of the lessor to grant the lease, or any estate, right, or interest arising before a specified date, or under a specified instrument, &c., and a title so registered is called a qualified title, which does not affect or prejudice the enforcement of any estate, &c., so excepted ; but save as aforesaid is to have the same effect as registration with an absolute title (rule 49).

It will be seen that Rules 48 and 49 correspond with sects. 8 and 9 of the Act of 1875 as to freeholds, already stated.

Where the lease contains a prohibition against alienation without license the registration is to be with a qualified title only ; and all estates, rights, interests, powers, and remedies under such lease, arising upon alienation without license, are to be expressly excepted from the effect of registration (rule 52). This rule makes provision for the concluding words of sect. 11 of the Act of 1875, already stated.

Notice of Lease.—Where land is registered and a lease affecting it is registered, notice of the registration thereof is to be given to the registered proprietor of the land, or of the superior lease out of which the lease is granted ; and if no valid objection is made within twenty-eight days after service of the notice, the lease will be noted against the title to the freehold or superior lease, in the same manner as notices of leases have to be entered under sects. 50 and 51 of the Act of 1875, and rules of 1898 (rule 53), which are stated *post*. See also rule 54.

Notices and Objections to Registration.—See *ante*, pp. 622, 623.

Land Certificate.—By the Act of 1897, sect. 8, sub-sect. 4 (i), on the first registration of leasehold land a land certificate or office copy of the registered lease is to be prepared and delivered to the registered proprietor or deposited in the registry, as he may prefer. And by rule 55, the provisions as to land certificates of sect. 10 of the Act of 1875, as amended by sect. 8 of the Act of 1897, is to apply to leasehold land. (See *ante*, p. 620.)

Since the operation of the above rule, it seems a leasehold land certificate is to be issued instead of the office copy lease.(a)

Continuous Term.—Where a lease and a reversionary lease to take effect in possession upon the determination of that lease, or within one month thereafter, are so held that the beneficial interest under both is in the power or control of the same person or persons, such leases so far as they relate to lands, comprised in both instruments, are to be deemed for the purposes of sect. 11 of the Act of 1875 (*ante*, p. 625) to create one continuous term (rule 56).

(a) Brick. and Sh. L. T. Acts, p. 290.

Freehold and Leasehold Land.

Sects. 17 to 20 of the Act of 1875, as amended, include both freehold and leasehold land.

Regulations as to Examination of Title.—Sect. 17 of the Act of 1875 provides that on the examination of the title by the registrar, due notice is to be given to afford an opportunity to persons desirous of objecting to registration to do so, and gives the registrar jurisdiction to hear and determine any such objections; but the section has already been inserted, with the rules applying thereto, *ante*, pp. 621 to 623.

Liabilities, &c., not deemed incumbrances.—By sect. 18 of the Act of 1875 as amended by the Act of 1897, sched. 1, all registered land shall, unless the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights, and interests as may be for the time being subsisting in reference thereto, and such liabilities, &c., shall not be deemed incumbrances within the meaning of the Act :

(1.) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges having their origin in tenure; and by the Act of 1897, schedule, liability to repair the chancel of any church, liability in respect of embankments, sea and river walls, and drainage rights, customary rights, public rights and profits, and profits *à prendre* and subject to the Act, rights acquired or in course of being acquired under the Limitation Acts.

(2.) Succession duty, land tax, tithe rentcharge, and payments in lieu of tithes, or of tithe rentcharge; and by the Act of 1897, schedule, estate duty (but as to succession duty and estate duty, see Act 1897, s. 13, *ante*, p. 624).

(3.) Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water and other easements.

(4.) Rights to mines and minerals; but by the Act of 1897, schedule, only when created previously to the registration of the land or the commencement of that Act.

(5.) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals when created as above stated.

(6.) Rights of fishing and sporting, seignoral and manorial rights of all descriptions, and franchises, exerciseable over the registered lands.

(7.) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies.

(A.) Provided that where it is proved that any land registered or about to be registered is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes, or of tithe rentcharge, the registrar may notify the fact on the register. The certificate of redemption, or other necessary evidence, must be produced (rule 175).

(B.) The Commissioners of Inland Revenue shall, upon the application of the proprietor of any land registered or about to be registered upon such

declaration being made, or such other evidence produced as they require, grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the registrar shall notify such fact on the register which is to be conclusive evidence of the fact so notified (see hereon Act 1897, s. 13 (*ante*, p. 624), and rule 173, stated *post*).

(c.) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the registrar may register him as proprietor thereof as well as of the land.

And by rule 176, where mines and minerals have been opened and worked by the proprietor of the land, or his predecessors in title, and it does *not appear* that the ownership of the mines and minerals is vested in any other person, &c., the proprietor of the land may be registered as proprietor of the mines and minerals also, which will thenceforth form part of, &c., the registered title of the land. Such registration is by a note in the property register stating that the mines and minerals are included.

(d.) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered or about to be registered, he may on the application of the person entitled to such mines and minerals register him as proprietor thereof, as in this Act mentioned, and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.

Where the existence of any such liabilities, rights, or interests, as are mentioned above, is proved to the satisfaction of the registrar, he may, if he think fit, enter notice thereof on the register.

And by the Act of 1897, sched. 1, when the abstract of title on first registration, or on registration as qualified or absolute discloses the existence of any such liabilities as are mentioned in sub-sects. (4) and (5), *supra*, the registrar must enter notice thereof on the register.

By the Act of 1897, sched. 1, where an easement is registered as an incumbrance the dominant and servient tenements are to be defined if practicable and required by the parties.

Notice of a power of re-entry, and of a right of reverter, may be entered on the register under sect. 18 of the Act of 1875.

By rule 178, an application to have made in the register against any land of notice of the existence of a liability, right, or interest, mentioned in sect. 18, as above amended (except death duties, mines, and minerals), must be made in writing, and state the particulars of the entry required, and be supported by satisfactory evidence. Notice must be given to the proprietor of the land. The entry, if made, is made in the charges register.

As to the registration of severed mines and minerals, see *ante*, p. 612. And by rule 177, when it appears from the documents or abstract of title, or admissions of the proprietor of the land, or other source, that all or any of the mines and minerals are severed from the land, the registrar must enter a note in the property register that such

mines and minerals are excepted from the registration. And by rule 64, on the registration of severed mines and minerals a plan showing the surface of the land under which the mines and minerals lie must be deposited in the registry, together with such other plans and further descriptions, if any, as may be deemed necessary to identify such mines and minerals; with full particulars of any appurtenant rights of access, or rights incidental to the working of the mines and minerals, subsisting and intended to be registered. As to the forms of transfer of land and mines and minerals apart, see rr. 87, 88, 89, stated *post*.

By the Act of 1897, sect. 24 (1), there can be no compulsory registration of the title to mines and minerals apart from the surface.

By rule 1 (4), "mines and minerals" include rights of entry, search, and other rights and reservations, &c., required to give effect to their enjoyment, &c.

It has already been shown that some of the liabilities and burdens enumerated in sect. 18, sub-sects. 2, 3, 5, and 7, are, as between vendor and purchaser, not considered as incumbrances.^(a) So in regard to mines and minerals (4), it has been shown that a conveyance of freeholds in fee will generally pass the mines and minerals also without their being expressly included therein.^(b) But it will be seen that under sect. 7 (2) of the Act of 1875, as to liabilities, &c., the contrary may be expressed on the register. And under sect. 18 (D), and rule 177, as above stated, provision is made for excepting from registration severed mines and minerals, &c.

Discharge of incumbrances.—By sect. 19 of the Act of 1875, where upon the first registration of any freehold or leasehold land, notice of an incumbrance affecting such land has been entered on the register, the registrar shall, on proof to his satisfaction of the discharge of such incumbrance, notify in the prescribed manner on the register, by cancelling the original entry or otherwise, the cessation of such incumbrance. By the Act of 1897, sched. 1, this section is to apply to part discharges.

By rule 179, when cessation of a noted incumbrance is required, the applicant, if there has been no dealing with or transmission of the incumbrance, must produce either the incumbrance with a release or receipt thereon, signed by the incumbrancer, or a discharge in due form. If there has been any dealing with or transmission of the incumbrance the applicant must deliver at the registry an abstract showing his title to make the application and prove the same as in cases of examination of title on first registration. Upon production of such document or proof the registrar may notify in the register the cessation of the incumbrance, either by cancelling the original entry or noting the fact of its cessation. See also rule 180.

Determination of Lease.—By sect. 20 of the Act of 1875, the registrar shall, on proof to his satisfaction of the determination of any lease of registered leasehold land, notify on the register such determination.

It has already been stated that by rule 53 a lease of registered land may

(a) *Ante*, pp. 55, 56, 86, 89, 91.

(b) *Ante*, p. 133.

be registered and noted against the title of the freehold, &c. (*ante*, p. 627). And by sects. 50 and 51 of the Act of 1875, as amended by the Act of 1897, and Rules of 1898, provision is made for noting certain leases as incumbrances on the land in respect of which the notice is entered, which will be found fully stated *post*.

By rule 181, when a lease which is noted in the register as an incumbrance expires by effluxion of time, or if determinable on a life or lives, by the falling in of the last life, any party interested may apply to have its determination noted in the register; which may be done by the registrar on production of satisfactory evidence that the lease has determined.

By rule 182, where the leasehold title has also been registered, notice of the above application must be given to the registered proprietor of the lease, unless he consents in writing or concurs in the application. Such notification closes the leasehold title.

By rule 183, where the lease expires by merger, surrender, re-entry, or enlargement into a fee simple under the Conveyancing Acts,^(a) the registrar must, before cancellation of the notice of the lease, make necessary inquiry into the beneficial interests in the freehold and leasehold titles.

No title by adverse possession.—By sect. 21 of the Act of 1875, a title to any land adverse to the title of the registered proprietor could not be acquired by any length of possession; but the section was not to prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

This section is, however, repealed by the Act of 1897, sched. 1; but sect. 12 of the latter Act enacts that a title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of the Act of 1875 or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register under sect. 95 of the Act of 1875, and on such application the court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of that Act or this Act, order the register to be rectified accordingly. And provided also, that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

It will be noticed on comparing the two sections that the title of a registered owner with an absolute title is, by sect. 12, strengthened by the provision that he may at any time make an entry, &c., to recover possession, but is rendered liable to be defeated by an order for rectification

(a) See *ante*, pp. 344, 359, 360, 372.

of the register. And by the Act of 1897, sched. 1, the first amendment to sect. 18 of the Act of 1875, includes rights acquired under the Limitation Acts, subject, however, to the Act of 1897.

As the policy of sect. 21 was, and sect. 12 is, to establish a title by registration independently of possession, it became necessary to repeal sect. 2 of 32 Hen. 8, c. 9, which was passed to prevent the sale of lands, unless the seller had been in possession for one year before the sale. This repeal is effected by sect. 11 of the Act of 1897.

REGISTERED DEALINGS WITH REGISTERED LAND.

Mortgage of Registered Land.

Creation of charges, &c.—By sect. 22 of the Act of 1875, a registered proprietor of any freehold or leasehold land may charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge is completed by the registrar entering on the register (1) the person in whose favour the charge is made as the proprietor thereof, and (2) the particulars of the charge, and (3) of the power of sale, if any; the registrar must, if required, deliver to the proprietor of the charge a certificate of charge. By the Act of 1897, sched. 1, charges created under this section are subject to the provisions of the Act of 1875, in respect of qualified or possessory titles.

And by the Act of 1897, s. 9 (3), every registered proprietor of land may, in the prescribed manner, charge it with an annuity or other periodical payment under the Acts 1875 and 1897. He may also charge it in favour of a building society, under the Building Societies Acts, by a mortgage made in pursuance of the rules of the society, and the mortgage is to be deemed a charge made in the prescribed manner, and is to be registered accordingly.

And by sub-sect. (6) where a person on whom the right to be registered as proprietor of land, or a charge has devolved by the death or bankruptcy of the registered proprietor, or has been conferred by an instrument of transfer or charge, he may charge the land, &c., before he is registered as proprietor.

Thus, an executor may charge the land before being registered as proprietor; and a purchaser can do so immediately on the execution of the transfer to him (Brickd. and Sh. L. T. A. 156). But by rule 153, no registration of the instrument can be made until the person executing it has been registered as proprietor, or his right to be so registered is shown to the registrar. (See also *post*.)

Implied covenants.—By sect. 23 of the Act of 1875, where a registered charge is created on any land there is to be implied on the part of the person being registered proprietor of the land, his heirs, executors, and administrators, unless negatived by an entry on the register, a covenant with the registered proprietor of the charge to pay the

principal sum charged, and interest, if any, thereon, at the appointed time and rate; and if the principal sum or any part thereof is unpaid at the appointed time, a covenant to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid. And by sect. 24, where the registered charge is created on leasehold land the further implied covenant, unless negatived as above, arises, that the registered proprietor of the land, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them.

See and compare these implied covenants with those implied under the Conveyancing Act, 1881, s. 7, on a mortgage of freeholds and leaseholds respectively, by the use of the words "beneficial owner" stated *ante*, p. 194; see also r. 148. And as to covenants implied in a statutory mortgage under sect. 26 of that Act, see *ante*, p. 193.

By rule 106, a charge on registered land must be in form 39 in sched. 1 to the rules, with such variations as are mentioned in the notes to that form. But if any of the stipulations under the heads A. and B. thereto are added, they are to be entered in the register. By rule 107, any other stipulations of which the registrar shall approve may be added if not referring to matters the entry of which is inconsistent with the principles on which the registry is kept.

It will be seen that under head A. stipulations may be introduced negativing the covenants implied by sects. 23 and 24.

By rule 108, a charge to secure an annuity or a future advance must be made in form 40 or 41, respectively, in sched. 1, and form 40 or 41 may be combined with form 39.

By rule 109 (as amended by rule 6 of Rules of 29th June, 1899), where part only of the land comprised in a title is included in a charge, that part must (subject to rule 150) be identified by a plan signed by the person creating the charge and by or on behalf of the person in whose favour the charge is made. By rule 150, an instrument dealing with part of the land comprised in a title may, where such part is clearly defined on the filed plan of the land, define it by reference to that plan, instead of by an accompanying plan.

By rule 203, the original amount of every charge is to be entered on the register and on the charge certificate.

Title, &c.—As to the title that may be required, and the searches to be made, see *post*, "Transfer of freehold land."

Completion and certificate.—Instruments of charge of registered land are to be executed as deeds and attested (rules 156, 157, *et post*). The charge may be completed and the money advanced at the Land Registry, or, if this be inconvenient, the money should not be advanced until registration is complete and the certificate of charge handed over, with

any deeds that may accompany it (see Cherry and Mar. L. T. Acts, p. 56, Lake's Instr.). But, subject to stipulation to the contrary, the registered proprietor of the charge is not entitled to have the custody of the *land* certificate; this certificate must, however, be produced at the time of registering the charge, and notice of the charge must be indorsed upon it. The certificate of charge will be prepared and delivered to the registered proprietor, or may, if he prefers it, be deposited in the registry. If so deposited it will be officially endorsed from time to time with notes of subsequent entries in the register affecting the charge. The registered proprietor may at any time apply for the delivery of the certificate to himself, and may at any time again deposit it in the registry. But where it is outstanding it must (save as excepted) be produced to the registrar to be indorsed as above (see Act 1897, s. 8; see also rules 206, 207, 208, stated *post*). A certificate of charge is to be in form 62, sched. 1, to the rules (rule 204, see also rule 204A).

It is difficult to state what estate a chargee obtains under a registered instrument of charge. The Act makes no provision hereon, as it does as to the estate of a transferee of land (see *post*). As it seems he does not take the legal estate, it may in some cases be advisable to mortgage registered land by a deed under sect. 49 of the Act, followed by a registered charge of the land in the name of the mortgagee (see Cherry and Mar. L. T. Acts, 56; Brickd. and Sh. L. T. A. 157). In which case the *ad valorem* duty is impressed on the mortgage deed, and the registered instrument bears no stamp duty (rule 164).

Remedies of proprietor of charge.—By sect. 25 of the Act of 1875, subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him thereunder, at any time during its continuance, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof; subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession.

By sect. 26, subject to any entry to the contrary on the register, such registered proprietor may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances as he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time. And by sect. 27, subject to an entry to the contrary on the register, such registered proprietor with a power of sale may, after the expiration of the appointed time, sell and transfer the land charged or any part thereof, in the same manner as if he were the registered proprietor of such land.

By rule 110, on obtaining an order for foreclosure absolute, the mortgagee can apply to be registered as proprietor of the land.

By the Act of 1897, sect. 9 (2), the provisions of sects. 19, 20, 21 (except sub-sects. 1 and 4), 22, 23, and 24 of the Conveyancing Act of 1881, are to apply to registered charges.

These sections, which are incorporated into a registered charge as if

contained in a mortgage deed, give to a mortgagee when the mortgage is by deed, powers of sale, insurance, and to appoint a receiver, with regulations as to the exercise of such powers, and to cut timber, all of which have been fully considered *ante*, p. 197, *et seq.* The excluded sub-sections of sect. 21 relate to conveyance by deed of the mortgaged property on a sale by the mortgagee, and to a sale by a person entitled to receive and give a discharge for the mortgage money, stated *ante*, pp. 198, 199.

Under form 39, B., stipulations may be introduced excluding the provisions of sects. 25 to 27 of the Act of 1875.

By rule 116, every *land* charge is to be deemed to be created by the person registered as proprietor of the land at the date of the charge, and is capable of registration; but if registered, the covenants under sects. 23 and 24 of the Act of 1875 are not to be implied, and the proprietor of the charge is not by virtue of registration to be entitled to any rights under sects. 25 to 27 of that Act, to which he would not otherwise have been entitled.

By rule 1 (3), "land charge" means a rent or annuity or principal moneys payable by instalments or otherwise, with or without interest, charged (whether upon the application of any person or not) otherwise than by deed, upon land under the provisions of any statute for securing to any person either the moneys spent by him or the costs and expenses incurred by him thereunder, or the moneys advanced by him for repaying another person who has incurred them; and a charge under sect. 35 of the Land Drainage Act, 1861, or sect. 29 of the Agricultural Holdings Act, 1883, but does not include a rate or Scot.

The words "whether upon the application of any person or not," in the above rule, were no doubt introduced to meet the decision in *R. v. Office of Land Registry*,^(a) stated *ante*, p. 169.

Priority and discharge of registered charges.—By sect. 28 of the Act of 1875, subject to any entry to the contrary on the register, registered charges on the same land are as between themselves to rank according to the order in which they are entered on the register, and not according to the order in which they are created.

The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register by cancelling the original entry or otherwise the cessation of the charge, and thereupon the charge shall be deemed to have ceased. By the Act of 1897, schedule, this is to apply to part discharges.

Under form 39, B. (5), stipulations may be introduced altering the priority of charges under sect. 28.

So under the Act of 1897, sect. 9 (5), the registrar may, with the consent of the registered proprietor of the land and of the proprietors of all registered charges, alter the terms of a charge. By rule 111, this is to be in form 42, sched. 1, to the Rules, executed by all the parties.

(a) 24 Q. B. 178.

As to the precautions to be taken to protect a paramount charge, or to obtain priority by registration, see rules 117 to 119; *et ante*, p. 616.

By rule 112, a discharge wholly or in part of a registered charge must be in form 43, sched. 1. But the registrar may act upon other proof of satisfaction thereof.

By rule 113, where the moneys secured by a mortgage or charge to a building, friendly, or industrial society have been paid, an instrument of discharge in the form provided by the L. T. R. 1898, under the seal of such society, if incorporated, or under the hands and seals of the trustees or proper officer of a building or friendly society, or of two members of the committee of an industrial society, if not incorporated, and attested by the secretary in each case, is to have the same effect on vacating the mortgage or charge, and vesting the estate, as a receipt endorsed thereon and attested, &c., in conformity with the Building, (a) Friendly, and Industrial Societies' Acts respectively.

Where a charge reserves the right to consolidate, it is not on that account only to be registered against any other land than that expressly described in it (rule 115).

By rule 127, a transfer of land, combined with a discharge of a charge, must be in form 45 in sched. 1 to the Rules. But by rule 90, a transfer of *land* in exercise of a power of sale contained in the registered charge must be in form 29.

By rule 120, the provisions of rule 101 as to registered land (*post*) is to apply, with the necessary modifications, to a registered charge.

Lien by Deposit of Land Certificate.

By the Act of 1897, s. 8 (4), the registered proprietor of freehold or leasehold land or of any charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of the registered lease, or certificate of charge, which is equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by the owner of the fee or term, or by a mortgagee beneficially entitled to the mortgage.

In the case of a possessory or qualified title, the title deeds prior to registration should, if in the party's possession, be also deposited.

By rule 200, the person with whom such certificate, &c., is deposited as security for money may, by registered letter or otherwise in writing, give notice to the registrar of such deposit, and of his name and address; and must describe, by reference to the county and parish or place and number of the title, the land to which the certificate or lease relates. The registrar enters the same in the charges register, and gives a written acknowledgment of its receipt. This entry operates as the lodgment of a caution under sect. 53 of the Act of 1875. (See *post*.) By rule 201, so long as such notice is on the register, no new certificate is to be issued under sect. 8 (3) of the Act of 1897, without notice to the person who gave notice of the deposit.

(a) See as to a building society, *ante*, p. 216.

By rule 202, the notice of deposit may be withdrawn from the register on the written request, signed and attested, of the person who gave the notice, or, on his written consent, on the request of the registered proprietor of the land, accompanied in each case by the land certificate, office copy, registered lease, or certificate of charge.

By the Act of 1897, s. 15, sub-s. 1 (ii.), where an incumbent of a benefice and his successors are the registered proprietors of land, no lien can be created by deposit of the land certificate, and an inhibition is to be placed on the register and on the land certificate accordingly.

Adaptation to incumbrances prior to registration, &c.—By rule 121, where it appears that any person is entitled to an incumbrance created prior to the first registration of land, the registrar shall, on his application or with his consent, and on proof of his title, and after notice to the registered proprietor of the land, register such person as the proprietor of such incumbrance. If there are several incumbrances their relative priorities are not to be affected by the registration of some of them only, or by the order of their entry on the register.

By rule 122, after the registration of the proprietor of an incumbrance, all transfers and other dispositions thereof are to be entered in the register, and, subject to an entry to the contrary, are to rank as between themselves, for purposes of priority in the order in which they are registered; and the incumbrance is to cease to be subject to the jurisdiction of any local deed registry.

By rule 123, the same forms and proceedings are to be used and adopted as to transfers and other dispositions of incumbrances so registered as are required in the case of registered charges.

Sub-charges.—By rule 124, the registered proprietor of a charge or incumbrance may charge the same with the payment of money in the same manner as the registered proprietor of land can do so. This, by rule 125, is called a sub-charge, and is to be completed, transferred, and discharged in the same form and manner, and subject to an entry to the contrary in the register, is as against the person creating the sub-charge, to imply the same covenants and confer the same powers as a charge. And, subject to an entry to the contrary, registered sub-charges on the same charge or incumbrance are, as between themselves, to rank according to the order in which they are entered in the register, and not according to that in which they are created.

By rule 126, certificates of incumbrance and of sub-charge are to be prepared in like forms, and issued and dealt with, and may be used to create a lien by deposit, in the same manner, and are to be produced, &c., as in the Acts and rules provided with regard to certificates of charge.

Transfer of Freehold Land.

Transfer of freehold land.—By sect. 29 of the Act of 1875, every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer is to be completed by the registrar entering on the register the transferee as proprietor of

the land transferred, but until such entry the transferor is to be deemed to remain proprietor of the land.

Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate; he shall also, in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate, containing a description of the land retained by him.

By the Act of 1897, s. 9 (1), the provisions of sect. 8 of the Conveyancing Act, 1881, are to apply, as far as applicable, to transfers of registered land as though they were made by deed, and a transfer of land made by the proprietor of a registered charge with a power of sale is to operate as a conveyance in professed exercise of the power of sale conferred by the said Act.

By sect. 8 of the Conveyancing Act, on a sale a purchaser cannot require the conveyance to be executed in his presence, or in that of his solicitor as such, but may, at his own cost, have the execution attested by some person appointed by him, who may be his solicitor.^(a)

Conditions of sale.—The section set out *infra* expressly prescribes what evidence of title a purchaser can require, and the enactment amounts to statutory conditions of sale thereon, in the case of an absolute, a qualified, or a possessory title. Sub-sect. 3, however, may be negatived by stipulation, as shown *infra*. On other matters stipulations may be made for (1) payment of purchase money and time of completion, and in case of delay purchaser shall pay interest (*ante*, p. 44); (2) for giving purchaser possession and for the discharge of outgoings (*ante*, p. 45); and (3) that purchaser shall bear the cost of any statutory declaration as to the liabilities, stated *infra*. (4) There is nothing to prevent a vendor, if necessary, from introducing stipulations to preclude a purchaser from calling for evidence as to estates excluded, &c., from registration, in the case of a qualified or possessory title.

Title.—By the Act of 1897, s. 16, a purchaser of registered land shall not require any evidence of title, except—

(i.) the evidence to be obtained from an inspection of the register or of a certified copy of, or extract from, the register;

(ii.) a statutory declaration as to the existence or otherwise of matters which are declared by sect. 18 of the Act of 1875 and by this Act not to be incumbrances;

(iii.) if the proprietor of the land is registered with an absolute title, and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge from the register;

(iv.) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration as a purchaser would be entitled to if the land were unregistered;

(v.) if the land is registered with a possessory title, such evidence of

(a) See *ante*, p. 151.

the title subsisting or capable of arising at the first registration of the land as the purchaser would be entitled to if the land were unregistered.

(2.) Where the vendor of registered land is not himself the registered proprietor thereof, or of a charge giving a power of sale over the land, he must, at the purchaser's request and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, or procure a transfer from the registered proprietor to the purchaser.

(3.) In the absence of special stipulation, a vendor of land registered with an absolute title cannot be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title can only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under sect. 7 of the Conveyancing Act, 1881, are to be construed accordingly.^(a)

Abstract, &c.—Under the above section where the land is registered with an absolute title, and the vendor has delivered his abstract of title (which in ordinary cases will be a copy of the land certificate duly noted), the purchaser must have it verified by the evidence set forth in sub-sect. 1 (i. to iii.), as the state of the title may require.

Any incumbrances, or any caution or inhibition appearing on the title, should be cleared off. As to restrictions or consents, see *post*.

A written authority to inspect the register and to apply for copies and extracts should be obtained; a clause to this effect might be inserted in the agreement of purchase. For an application to inspect any entry in the register or any document in the custody of the registrar relating to any land or charge must be made by or under the authority of some person interested in the land or charge, or by an order of the court. And when not made by or under the written authority of the registered proprietor, can only be made on notice to him, unless the applicant satisfies the registrar that for sufficient reason the above requirements cannot be fulfilled. (Act 1875, s. 104; Act 1897, s. 22 (7), r. 14, 222, 229.)

If any length of time is likely to elapse between the contract of sale and completion of the purchase, it may be advisable for the purchaser to lodge a caution (in form 53) against intermediate dealings, under sect. 53 of the Act of 1875, stated *post*.

If the land is registered with a qualified or possessory title, the purchaser should call for the evidence specified in sub-sect. 1 (iv. and v.), *supra*, which includes the title to the estates, &c., excluded, &c., from the register; unless there be a stipulation to the contrary.

Searches.—Any person authorised to inspect the entries in the register relating to a title, charge, or incumbrance, may apply to the registrar in writing, signed by himself or his solicitor, to make an official search (stating the search required), against such title, &c., and to issue a certificate as the result. This certificate is in form 63, sched. 1 (rule 224).

So the registered proprietor may apply by telegram for an official search as to whether any caution, restriction, inhibition or notice has been

(a) See as to these covenants, *ante*, p. 141.

entered against the title or charge since a date named, which must not be earlier than the date of the land certificate or certificate of charge held by the applicant (rule 225).

The application must give the number of the title, the parish or place, and, in the case of a charge, a sufficient description thereof, and must be signed by the registered proprietor, or by his solicitor, as such. The search fee must be sent by the same telegram and the reply be prepaid. The answer is "yes" or "no," &c. (rules 226, 227).

A solicitor or other person obtaining an official certificate of the result of a search is not to be answerable for any loss that may arise from any error therein. If the solicitor is acting for trustees, executors, &c., they are not answerable (rule 228).

In case the land is registered with a qualified or possessory title, search must be made against the title to the estates, &c., excepted from registration; these will be the ordinary searches,^(a) as to which see *ante*, p. 170.

Transfers.—By rule 79, a transfer of the whole of the land comprised in a title is to be in form 14, in sched. 1 to the rules; and by rule 80 a transfer of part thereof in form 15 and subject to rule 150 (*ante*, p. 633), must be accompanied by a plan showing the land transferred, and the plan must be signed by the transferor, and by or on behalf of the transferee.

By rule 81, a transfer of land to the uses of a settlement must be in one of the forms 16 to 22 in sched. 1, with the addition of the proper inhibitions or restrictions. (And see *ante*, p. 616.)

By rules 83 and 84, a transfer of land in consideration of a rent may be made by an instrument in any form legally sufficient for the purpose of which the registrar may approve. The transferee is registered as proprietor of the land, and the transferor as proprietor of the rent in the charges register, with a reference thereto in the title of the transferee.

As to the transfer of freeholds subject to an existing rent, see rule 85.

By rule 86, on a transfer of land subject to a mortgage, charge, or other incumbrance, covenants by either party to pay the money owing, and to indemnify the other party, may be added to the instrument of transfer, and, if wished, may be referred to in the register.

By rule 87, transfer of land without the mines and minerals, or with certain excepted mines and minerals, must be made by an instrument in form 23 or 24 or 25, respectively. The transferee is registered as proprietor of the land, with a note of the exceptions; and the transferor as proprietor of the excepted mines and minerals.

By rule 88, a transfer of mines and minerals without the land, or of certain specified mines and minerals, &c., are to be in forms 26, 27, or 28, according to the facts. The transferee is registered as proprietor of the mines and minerals, with a note entered against the transferor's title that the mines and minerals, or certain specified mines and minerals, &c., have been transferred. (See also rule 89.)

By rule 102, a transfer of land with restrictive conditions annexed

(a) See Cherry and Mar. L. T. Acts, p. 204; Lake's Instr.

under the Act of 1875, s. 84, as amended by the Act of 1897, schedule 1 (*ante*, p. 622, *et post*), must be in form 36. If the conditions are not in the transfer, a copy thereof must be delivered at the registry.

By rule 90, a transfer of land in exercise of a power of sale contained in a registered charge must be in form 29. And by the Act of 1897, sect. 8 (4), in such case the transfer may be registered and a new land certificate issued to the purchaser without production of the former land certificate, but the certificate of charge (if any) must be produced or accounted for. This is an exception to the general practice defined by sub-sect. 3, as will presently be shown.

It will be seen on referring to the forms of transfer, that (1) there is no receipt for the consideration introduced. Unless such a receipt be introduced with the instrument of transfer, no payment of the purchase money to the purchaser's solicitor could be made under the Conveyancing Act, 1881, sect. 56 (*ante*, p. 151), without the purchaser's written authority. (2) The words "to the use of" in the operative part of the transfer are absent, therefore no legal estate can pass to the transferee under the Statute of Uses (27 Hen. 8, c. 10), or it would seem at common law. The first registered proprietor and his transferee, when registered, take a statutory title and estate under the Acts. (3) It will also be noticed that no words of limitation are used on the forms; and it is not until registration that the statutory fee simple arises (Act 1875, ss. 7, 29, 30). Further (4), the operation of sect. 16 (3) of the Act of 1897 (*ante*, p. 639) may be negatived by stipulation, and if this is done the covenants for title may be implied under sect. 7 of the Conveyancing Act, 1881.(a) If any stipulations on the above points should be introduced into the instrument of transfer, the draft thereof should be submitted to the registrar for his approval (see rules 146 and 149).

It must also be remembered that under sect. 49 of the Act of 1875 (*post*), the registered proprietor of registered land may create estates, &c., in the same manner as he might do if the land were not registered.

However, by rule 146, no recital or provision not authorised by the L. T. R., 1898, or the notes to the forms, are to be inserted. But by rule 148, for the purpose of introducing the implied covenants under the Conveyancing Act, 1881, a person may, in a registered disposition, be expressed to execute, transfer, or charge as beneficial owner, settlor, trustee, mortgagee, personal representative, or committee of a lunatic so found, or under an order of the Court; and the instrument of transfer, &c., may be worded accordingly; but no reference to such implied covenants is to be entered on the register.

Instruments for which no form is provided, &c., are to be in such form as the registrar directs (rule 147). And he may decline to enter an instrument or entry which is improper in form or substance, &c., either absolutely or without such modifications as he may approve (rule 149).

By rule 96, a transfer of land for charitable uses within the Mortmain and Charitable Uses Act, 1888, must, except in cases exempted by

(a) See rule 148; and as to these covenants, see *ante*, p. 141.

sect. 7 (i.) thereof (*ante*, p. 4), be in form 32 in sched. 1 to the rules, and must refer to the statute or other authority under which it is made; and where such statute or authority contains a limit as to the extent of the land to be conveyed or held (*ante*, p. 4), or any provisions as to the purposes for which it is to be used, a statement showing that the whole land does not exceed the limit, and the purposes for which it is to be used, must be added; and proved by statutory declaration or otherwise.

By rule 95, a transfer of land to an incorporated company, or corporation sole or aggregate (see *ante*, p. 1), must be in form 31, and refer to the license in mortmain or statute enabling the corporation to hold land (*ante*, p. 2); and if it contains any limit as to the extent of the land, or provisions as to the purposes, they must be stated and proved, as in the previous rule. But a transfer of land from the ecclesiastical commissioners to an incumbent, &c., is exempt from this rule. And see rules 98, 99 and 100, as to conveyances to the ecclesiastical commissioners, &c.

By rule 97, a transfer of land under either rule 95 or 96 is not to be registered until the registrar is satisfied that such transfer is in accordance with the law as to mortmain, &c.

Lands included in more than one title may be included in one disposition (rule 151). And where under any statute, &c., a corporation, company, or society is empowered or required to take conveyances or mortgages, or to execute deeds, &c., in any particular form, all transfers or other instruments requiring registration may be adapted to such form, and the scheduled forms modified as the registrar directs or approves (rule 152).

By rule 103, when any registered land is exchanged for other registered land, the exchange is to be in form 37 in sched. 1 to the rules. (See also rule 104.)

By rule 105, a partition is to be in form 38.

By the Act of 1897, sect. 9 (6), and rule 153, where a person on whom the right to be registered as proprietor of land or a charge has devolved by death or bankruptcy, or has been conferred by transfer or charge, desires to transfer or charge the land or deal with the charge before he is himself registered as proprietor, he may do so in the same form as is required for a disposition by the registered proprietor. But no registration of such instrument can be made until he has been registered as proprietor, or his right to be registered is shown. (See also rule 154.)

By rule 155, where the consent of a person is required to a disposition, such consent may be given by the instrument of disposition executed by such person.

By rule 266, ordinary printed forms for use in the registry are to be supplied free of charge to applicants for registration.

Execution.—Every instrument of transfer, charge, exchange or partition of registered land, or of any registered charge on land, including any alteration of a charge, must be executed as a deed; and be executed in the presence of a witness, who must write his name, address, and description in the attestation clause (rules 156 to 158).

By rule 159, if any instrument is executed by attorney, the power of attorney, or an office copy thereof, and in cases not falling within the Conveyancing Act, 1882,(a) evidence (by statutory declaration of the attorney or otherwise) showing that the principal was alive at the time of the execution and the power then unrevoked, must be produced to the registrar; and the original power of attorney filed either at the central office or in the registry.

By rule 101, when the power of disposing of registered land has by the operation of any statute, or by order of court, or by paramount title become vested in some person other than the registered proprietor (as in the case of a deed poll executed under the Lands Clauses Consolidation Act, 1845, s. 77, or a vesting declaration, or on a sale by a mortgagee, with a title paramount to the title registered), and the registered proprietor refuses to execute a transfer, &c., the registrar may, after notice to him, and production of the land certificate or office copy, registered lease, &c., make such entry in, or correction of, the register as he may deem fit. By rule 120 rule 101 applies to registered charges.

Registration.—By rule 160, when instruments capable of registration are delivered at the registry with the proper Inland Revenue and Land Registry fee stamps affixed thereto or impressed thereon, with the land certificate, office copy, registered lease, or certificate of charge, as the case may be, if such certificate, &c., is not already there, they will be entered in the register in the order in which they are delivered, which is to be the order of their priority. If several instruments are delivered by post on the same day relating to the same property or charge, they rank together for purposes of priority.

By rule 161, if an instrument purporting to be already executed by a registered proprietor is delivered for registration, notice thereof is to be sent to him at his registered address, and unless this execution is admitted by him, registration is not to be completed until after the expiration of three clear days from the posting of the notice. (As to the address, see sect. 89, Act 1875, and rule 260, stated *post.*) The notice under rule 161 need not be by registered letter. (See rule 256.)

Unless otherwise provided by the rules, all deeds and documents on which an entry in the register is founded are not to be removed from the registry save under an order of the registrar or of the Court (rule 162, and see rule 252). But an instrument of charge in favour of a building, friendly, or industrial society may be delivered to them after registration upon their delivering at the registry a copy thereof, verified by the signature of the secretary as being correct. The copy need not be stamped (rule 163). The instrument of charge must be endorsed with a certificate of registration, and the instrument so endorsed is to be treated for all purposes as the certificate of charge (rule 163 A., 29th June, 1899).

Stamps.—Rules 164 and 165 deal with questions as to *ad valorem* stamps in the events there specified. Rule 164 is stated *ante*, p. 634.

Land certificate, &c.—The concluding part of sect. 29 of the Act of

(a) See hereon, *ante*, p. 109.

1875 must be read in connection with sect. 8 of the Act of 1897, which now, as already shown, provides(a) for the preparation and issue of a land certificate, office copy of the registered lease, or certificate of charge.

By sect. 8, sub-sect. 1 of this Act, so long as a land certificate, office copy of a registered lease, or a certificate of charge, is outstanding, it must (save as excepted by sub-sect. 4)(b) be produced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates, and on every registered transmission or certification of the register, and a note of every such entry, &c., is to be officially endorsed on the certificate or office copy, &c. (And see rule 208, *infra*.)

By sub-sect. 2, where a land certificate or office copy of a registered lease has been issued, the vendor must deliver it to the purchaser on completion of the purchase; or if only part of the land is sold, he must, at his own expense, produce or procure production of the certificate or office copy, and if lost or destroyed he must pay the cost of the proceedings required to enable the registrar to proceed without it.

By sub-sect. 3, a new land certificate, office copy registered lease, or certificate of charge is not to be granted in place of a former one which has been lost or destroyed, unless the applicant has filed with the registrar a statutory declaration and such other evidence as the registrar may require, stating the fact and circumstances of the loss or destruction, nor until at least one advertisement of the application in the Gazette, and three advertisements in a London daily morning newspaper, have been published at intervals of not less than seven days, and three advertisements in a local newspaper circulating in the district where the land is situate, and such indemnity, if any, as the registrar thinks fit.

By rule 207, except in the cases mentioned in sub-sect. 3 (*supra*) and sub-sect. 4 (*ante*, p. 641), and in the case of registration of a foreclosure under rule 110, no new certificate or office copy registered lease is to be issued unless the existing certificate or copy is delivered up to the registrar to be cancelled.

By rule 208, where a certificate is required to be produced to the registrar, but cannot be produced at the registry without disproportionate trouble, expense, or delay, he may authorise an officer of the registry, or a solicitor, to inspect it elsewhere at the applicant's expense, and to make the proper indorsement, if any, thereon, &c.

By the Act of 1875, sect. 79, the registrar may, upon delivery up to him of a land certificate, or office copy of a registered lease, or a certificate of charge, grant a new certificate, &c., in place of the one delivered up.

By sect. 80, a land certificate or certificate of charge is to be *prima facie* evidence of the matters therein contained, and the office copy of a registered lease is to be evidence of the contents of the lease.

By rule 206, whenever a certificate is delivered out of the registry a receipt must be signed by the recipient.

(a) See *ante*, pp. 619, 620.

(b) This sub-section is given *ante*, p. 641.

Estate of transferee for value.—By sect. 30 of the Act of 1875, a transfer for valuable consideration of freehold land registered with an absolute title, when registered, confers on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject—

(1) To the incumbrances, if any, entered on the register; and

(2) Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty.

On comparing the above section with sect. 7 of the same Act, it will be seen that in sect. 30 there is no saving of any unregistered estates, rights, &c., to which the estate may be subject, as there is in sect. 7 (3).

By sect. 31, a transfer for valuable consideration of freehold land registered with a qualified title, when registered, has the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that such transfer does not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

By sect. 32, a transfer for valuable consideration of freehold land registered with a possessory title does not affect or prejudice the enforcement of any right or interest adverse to, or in derogation of, the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, when registered has the same effect as a transfer for valuable consideration of the same land registered with an absolute title.

Estate of voluntary transferee.—By sect. 33, a transfer of freehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same, but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

Under this section it will be noticed that a *voluntary* transferee of freehold land takes, subject to any unregistered estates, &c., subject to which the transferor held the land.

As to the law applying to voluntary settlements generally, see *ante*, p. 487 *et seq.* As against a registered volunteer, the register could be rectified under sect. 95 of the Act of 1875 (*post*), on the avoidance of the voluntary transfer either under the Bankruptcy Act, 1883, s. 47, or under 13 Eliz. c. 5. But it is contended that, as against a registered transferee for value from the volunteer, the register could not be rectified either under sect. 95, or sect. 7 (2) of the Act of 1897 (*post*), on the principle laid down in *Re Carter v. Kenderdine*.^(a) (See Brickd. & Sh., L. T. A., p. 167.)

By the Act of 1897, schedule, in the absence of anything to the

(a) (1897), 1 Ch. 776; stated, *ante*, p. 490.

contrary in the register or transfer, or in the case of leasehold land, in the lease, the word "land" in sects. 30 to 33 of the Act of 1875 includes the mines and minerals, if parcel thereof.

Land held by Incumbents of Benefices.

By the Act of 1897, s. 15 (1), where the incumbent of a benefice and his successors are the registered proprietors of land (i.), no disposition thereof is to be registered unless a certificate is obtained (A) in cases of sales under the Parsonages Act, 1838, or the Church Building Act, 1839 (or amending Acts), from Queen Anne's Bounty; or (B) in case of sales under the Glebe Lands Act, 1888 (or amending Acts), from the Board of Agriculture; or (C) in all other cases from the Ecclesiastical Commissioners.

The production of any such certificate is a sufficient authority to the registrar to register the disposition.

(2) If the certificate from Queen's Anne's Bounty states, or it otherwise appears, that the land was originally purchased by Queen Anne's Bounty, or was appropriated by or with the concurrence of such bounty to the benefice for the augmentation thereof, the registrar enters a note thereof.

(3) Where the incumbent is entitled to indemnity under the Act of 1897, the money is to be paid to Queen Anne's Bounty, &c.

(4) "Benefice" comprehends rectories with care of souls, vicarages, perpetual curacies, donatives, endowed public chapels, and parochial chapelries, and chapelries or districts belonging, &c., to any church or chapel.

By rule 197, an inhibition is to be entered in the register and on the land certificate in form 59 in sched. 1 to the rules, that no disposition of the land is to be made except in accordance with the above section. But by rule 198, where the sale is by an incumbent under the Glebe Lands Act, 1888, the receipt of the Board of Agriculture for the purchase money is to be deemed to be a sufficient certificate. By rule 199, in all other cases of dispositions by incumbents under sect. 15 of the Act of 1897 (*supra*), the certificate is to be in form 60 in sched. 1.

Transfer of Leasehold Land.

Transfer of leasehold land.—By sect. 34 of the Act of 1875, every registered proprietor of leasehold land may transfer the whole of his estate in such land or in any part thereof. The transfer is completed by entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor is to be deemed to remain proprietor of the land.

This section also contained a provision regulating the right of the transferee to the office copy registered lease; but that part of the section is, by rule 57 of the L. T. R. 1898, to be deemed to have been omitted from the section, i.e., repealed.

By rule 94, the provisions as to land certificates of sect. 29 of the Act

of 1875, as amended by sect. 8 of the Act of 1897, are to apply to leasehold land (see *ante*, pp. 620, 642).

By rule 91, a transfer of leasehold land is to be in form 30 in sched. 1 to the rules, and all or any of the covenants implied by sect. 39 of the Act of 1875, may, if desired, be negatived by suitable words added to the transfer, and in that case an entry negating them will be entered in the register. If it is desired to substitute modified covenants for the covenants implied by sect. 39, the necessary additions may be made to the transfer.

Estate of transferee for value of leaseholds.—By sect. 35 of the Act of 1875, a transfer for valuable consideration of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held shall, when registered, be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease relating to such land, with all implied or expressed rights, privileges, and appurtenances attached to such estate, but subject—

(1) To all implied and express covenants, obligations, and liabilities incident to such estate; and

(2) To the incumbrances (if any) entered on the register; and

(3) Unless the contrary is expressed on the register, to such liabilities, rights and interests as affect the leasehold estate and are by this Act declared not to be incumbrances in the case of registered freehold land; but free from all other estates and interests whatsoever, including estates and interests of Her Majesty.

It has already been shown (*ante*, p. 626) that no provision is made by the new rules for the registration of leasehold land with a declaration that the lessor had an absolute right to grant the lease under which the land is held. But by rule 47, registration of leasehold land with an absolute title has that effect; and by rule 92, a transfer for value of leasehold land registered with an absolute or qualified title shall, when registered, have the effect given by sect. 35 (*supra*) to such a transfer of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease under which the land is held; save that where any estate, right, or interest is excepted from the effect of registration, the transfer shall not affect the enforcement of any estate, &c., excepted.

By rule 93, a transfer for value of leasehold land registered with a possessory title is, when registered, to have the same effect as a transfer for value thereof registered with an absolute title, save that the transfer is not to prejudice the enforcement of any right, or interest (whether of the lessor's title or otherwise) adverse to the title of the first registered proprietor, and subsisting or capable of arising at the time of registration.

Sect. 36 of the Act of 1875 is repealed by rule 57, and is replaced by rule 92, set out *supra*.

Sect. 37 is also repealed by rule 57. It dealt with the estate of a transferee for value of leasehold land without a declaration of the lessor's title.

Estate of voluntary transferee of leasehold land.—By sect. 38 of the Act

of 1875, a transfer of leasehold land made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities, subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration.

The above section has, as to leaseholds, the same effect as sect. 33 of the Act has as to freeholds. (See the remarks on that section, *ante*, p. 645.)

By the Act of 1897, schedule, in the absence of anything to the contrary in the register, or transfer, or in the lease, the word "land" in sects. 35 and 38 of the Act of 1875, includes the mines and minerals if parcel thereof.

Implied covenants on transfer of leaseholds.—By sect. 39 of the Act of 1875, on the transfer of any leasehold land under this Act, unless there be an entry on the register negating such implication, there shall be implied as follows:

(1) On the part of the transferor a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and

(2) On the part of the transferee a covenant with the transferor, that he, the transferee, his executors, administrators, or assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor, his heirs, executors, and administrators, indemnified against all actions, suits, expenses and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them. It has already been shown that under rule 91 these covenants may be either negated or modified by the instrument of transfer; as would be necessary if the transferor were a trustee.

Transfer of Charges.

Transfer of charges.—By sect. 40 of the Act of 1875, a registered proprietor of any charge may transfer it to another person as proprietor. The transfer is completed by the registrar entering on the register the transferee as proprietor of such charge; he must also, if required, deliver to the transferee a fresh certificate of charge, but the transferor is to be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof.

By the Act of 1897, s. 9 (4), nothing contained in any charge is (i.) to take away from the registered proprietor thereof the power of transferring it by registered disposition, or of requiring the cessation thereof to be noted in the register, or (ii.) affect any registered dealings with land or

a charge in respect of which the charge is not expressly registered or protected.

The object of this section is not very clear. See, however, the note thereon in Brickd. and Sh. L. T. A., p. 299.

By rule 114, a transfer of a charge must be in form 44 in sched. 1 to the rules.

By the Act of 1897, schedule, a registered transferee for value of a charge and his successors in title are not to be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware when it was transferred to him.

As to the certificate of charge, see *ante*, pp. 633, 634, 644.

Transmission of Land and Charges.

As to freeholds.—By sect. 41 of the Act of 1875, on the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any freehold land, such person shall be registered as proprietor in the place of the deceased proprietor or proprietors as may, on the application of any person interested in the land, be appointed by the registrar, regard being had to the rights of the several persons interested in such land, and in particular to the selection of such person as may for the time being appear to the registrar to be entitled according to law to be so appointed, subject to an appeal to the court.

This section is, except where the deceased proprietor was a tenant for life (*ante*, p. 616), superseded by sects. 1 to 5 of the Act of 1897, under which real estate vested in any person (dying after 1897) without a right in any other person to take by survivorship is to become vested in his personal representative, notwithstanding any testamentary disposition. These sections, being of general application, are fully considered *ante*, pp. 29 to 32, 583. The mode of procedure under sect. 41 (*supra*) is set out after sect. 42, *infra*; and as to appeals, see *post*.

As to leaseholds.—By sect. 42 of the Act of 1875, on the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any leasehold land or of any charge, the executor or administrator of such sole deceased proprietor, or of the survivor of such joint proprietors, shall be entitled to be registered as proprietor in his place.

By rule 128, on production of probate or letters of administration of a sole (or sole surviving) registered proprietor of land or of a charge (dying after 1897) the personal representative named in such probate or letters is to be registered as proprietor in place of the deceased proprietor, with the addition of the words "executor (or administrator) of deceased," and if an executrix or administratrix is a married woman, that must be stated.

By rule 172, on a registration under the above rule notice of liability to death duty is not to be entered (see hereon *ante*, pp. 624, 628; *et post*).

And by rule 129, when, after one executor has been registered as proprietor, another executor applies to be registered as joint proprietor

with him, the registrar must, after notice to the other executor, make the necessary alteration upon production by the executor applying of the probate obtained by him; or if he has not proved, of a written statement signed by him that he has accepted the executorship.

The Act of 1897, sect. 3 (1), provides for the assent by the personal representative to a devise contained in the testator's will, or the conveyance of the land devised to the heir, devisee, &c. (*ante*, p. 30), and by sub-sect. 4, the production of such assent by the personal representative of a deceased proprietor of registered land is to authorise the registrar to register the person named therein as proprietor of the land. And by sect. 4 (1) provision is made for the appropriation of any part of the deceased's residuary estate in satisfaction of a legacy or share of such residue (*ante*, p. 587). And by sub-sect. 3, in the case of registered land, upon production of the evidence of appropriation the necessary registration is to be made.

By rule 130, an assent is to be in form 46 in sched. 1 to the rules, and an appropriation in form 47. On production of the probate or letters of administration with the will annexed, &c., and the proper form, the devisee or legatee, or transferee will be registered as proprietor.

By rule 173, where the personal representative assents to a devise or appropriation, or transfers land to any person otherwise than by sale, notice of the liability to death duty is to be entered unless there is produced to the registrar (A) proof to his satisfaction that the duty has been paid or satisfied; or (B) a certificate from the Commissioners of Inland Revenue in form 51, in sched. 1 or to that effect; or (C) proof that the applicant is entitled to the land in such a capacity that any liability to duty would not affect a purchaser from him if the land were unregistered.

By rule 174, as amended by rule 8 of June 29, 1899, where a notice of liability to duty has been entered on the register, it shall be cancelled on production of such evidence as is mentioned in the above rule.

By rule 136, on the death of one of several joint proprietors of land, the name of the deceased will be withdrawn from the register on production of a certificate of death, or probate or letters of administration, with evidence of identity, by statutory declaration or otherwise.

Abatement.—By rule 251, in case of death or transmission or change of interest, pending an application for registration, the proceedings are not to abate, but may be continued by any person entitled to apply for registration who desires to adopt them.

By rule 262, where no step has been taken in a matter pending in the registry for two months, notice may be given to the applicant or his solicitor that the matter will be treated as abandoned unless prosecuted within a time (not less than one month) to be fixed by the registrar, and named in the notice.

Bankruptcy.—By sect. 43 of the Act of 1875, on the bankruptcy of any registered proprietor of any land or charge, or on the liquidation of his affairs by arrangement, his trustee shall be entitled to be registered as proprietor in his place.

By the Act of 1897, schedule, the above section is not to apply until

it is certified by the court having jurisdiction in bankruptcy that the land or charge is part of the bankrupt's property divisible amongst his creditors. The official receiver is entitled to be registered pending the appointment of a trustee.

By rule 138, on production to the registrar of an office copy of an order of adjudication in bankruptcy, &c., of the proprietor, with a certificate signed by the official receiver that any registered land or charge is part of the bankrupt's property, divisible among his creditors, the official receiver may be registered as proprietor. And by rule 140, if the official receiver has not been so registered, the trustee may be registered as proprietor on production of office copies of the order of adjudication and the certificate of the trustee's appointment, with a certificate signed by him that the land or charge is part of the bankrupt's property divisible among his creditors. See also rules 139, 141 to 145.

By the Act of 1897, s. 9 (6), the official receiver or trustee in bankruptcy may transfer without his being registered proprietor. (See the section, and rules *ante*, p. 642.)

Marriage of female proprietor.—By sect. 44 of the Act of 1875 (as amended the Act of 1897, schedule), as already shown (*ante*, p. 618), the husband of any female registered proprietor of freehold land may apply to be registered as co-proprietor with his wife, but he is to be so described on the register; and if he predeceased her, the original registry of the wife, with a change, if necessary, in the name, revives, &c. If the husband survives the wife, he is not entitled to be registered as sole proprietor of the land, but there must be registered as co-proprietor with him if he is entitled as tenant by the curtesy, and as sole proprietor in place of himself and his deceased wife if he is not entitled as tenant by the curtesy, such person as may, on the application of any person interested in right of the wife, be appointed by the registrar with power for the registrar on a like application to appoint from time to time another person or other persons in the event of any person registered as co-proprietor with the husband dying in his lifetime. The order of the registrar is subject to an appeal to the court.

By sect. 45 of the Act of 1875, the husband of any female registered proprietor of leasehold land or of a charge may apply to be registered as proprietor in her place.

By the Act of 1897, schedule 1, sects. 44 and 45 of the Act of 1875 are not to apply to the case of any woman married on or after 1st January, 1883, or to any property to which a married woman is entitled for her separate use.

As to the alterations in the law in regard to married women coming within the Married Women's Property Act, 1882, see *ante*, pp. 15, 16, 403, 404. See also *post*, sect. 83 (4), and sect. 87.

Title of fiduciary proprietor.—By the Act of 1875, s. 46, any person registered in the place of a deceased or bankrupt proprietor shall hold the land or charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities subject to which the

deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall in all respects, and in particular as respects any registered dealings with such land or charge, be in the same position as if he had taken it under a transfer for value.

This section must now be read in connection with the Act of 1897, sects. 1 to 4, already (*ante*, pp. 29 to 32) considered, and sect. 43 and rules, stated *ante*, p. 650.

Evidence of transmission.—By sect. 47, the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner.

See the remarks made *ante* under sects. 41, 42, and 43, and rules there stated.

Sect. 48 of the Act of 1875 is repealed by sect. 30 of the Conveyancing Act of 1881 (see *ante*, p. 26).

UNREGISTERED DEALINGS WITH REGISTERED LAND.

Unregistered dispositions.—By sect. 49 of the Act of 1875, the registered proprietor alone is to be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest therein, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

The registered proprietor alone is entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

By the Act of 1897, schedule, this section includes power to sever mines and minerals from the surface.

It will be seen that by sect. 49 of the Act of 1875 the registered proprietor—or, subject to his estate, any other person having a sufficient estate or interest—may create estates, &c., in the *same manner* as he might do if the land were *not* registered. And the registered proprietor may, it seems, after creating any such estates, &c., by a registered disposition, transfer the land and so defeat the estates he has created. For as already shown (*ante*, p. 617), by the Act of 1897, schedule, neither the registrar nor any person dealing with registered land or a charge are to be affected with notice of a trust, &c. The only protection that an unregistered owner of equities has, as against the registered proprietor, is the power to

enter on the register such notices, cautions, &c., as are mentioned in the section, and mainly provided for by sects. 53 to 57 of the Act of 1875, set out *infra*.

Notice of Leases.

Registration of notice of lease.—By the Act of 1875, s. 50 (as amended by the Act of 1897, schedule), any lessee or other person entitled to or interested in a lease or agreement for a lease of registered land where the term granted is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with such lease or agreement, may apply to the registrar to register notice of such lease or agreement, and when so registered every registered proprietor of the land, and every person deriving title through him, excepting proprietors of incumbrances registered prior to the registration of such notice, are to be deemed to be affected with notice of such lease or agreement as being an incumbrance on the land in respect of which the notice is entered.

Sect. 50 of the Act of 1875 after the word “land” contained the words “made subsequently to the last transfer of the land on the register.” These words are by the Act of 1897, schedule, repealed.

It will be remembered that by sect. 11 of the Act of 1875 a separate register is to be kept of leasehold land; and whether the lease be registered or not it is important that it should be noted on the register of the landlord's title. Only the leases specified in the section can be so noted. By the Act of 1875, s. 18 (7), leases, &c., not exceeding twenty-one years in case there is an occupation under such tenancies, are not deemed incumbrances.

The Acts contain no special provision enabling the registered proprietor as such to grant a lease. But a lease may be granted under sect. 49 of the Act of 1875, stated *supra*, and if of sufficient duration be registered under sect. 11, or notice thereof entered under sect. 50. The form of the lease will be the same as under the ordinary practice; but should have a plan of the parcels endorsed.

Mode of registration.—By the combined effect of sect. 51 and rule 166, upon an application to register notice of the lease or agreement, such lease or agreement, together with a copy thereof, and a copy or tracing of the plan (if any) thereon, and either the written consent of the registered proprietor of the freehold, or of the superior lease out of which the lease or agreement of which notice is to be registered is derived, or an order of the court authorising the registration of the notice, must be delivered at the registry, and thereupon the registrar will enter the notice. And by rule 166A. (29th June, 1899), where the lease or sub-lease is by way of security for money, the land certificate of the lessor or sub-lessor must be produced and indorsed with a note of the entry. By the Act, 1897, sched. 1, however, a term created for mortgage purposes is not to be deemed a lease within sect. 11 of the Act of 1875 (*ante*, p. 625).

By rule 167, if the lease or agreement comprises only part of the land in the title, and does not contain sufficient particulars (by plan or otherwise)

to enable such part to be clearly shown on the filed plan of the land, the applicant (with the concurrence of the necessary parties, if any) must furnish the necessary information.

By rule 168, the notice in the register must refer to the filed copy of the lease or agreement and give the term, &c. Any right of pre-emption must also be noted. The lease or agreement is marked with a note of the entry and returned to the applicant.

By rule 169, if the lease or agreement is not produced, a statutory declaration by the applicant or his solicitor, stating the reason why and verifying the copy, must be furnished.

See also rule 53 as to notice of registration of a lease, stated *ante*, p. 627, and rules 181 and 182, as to noting the determination of a lease, stated *ante*, p. 631.

Notice of Estates in Dower or by the Curtesy.

By sect. 52 of the Act of 1875, any person entitled to an estate in dower or by the curtesy in any registered land may apply to register notice of such estate; and the registrar, if satisfied of the title of such person to such estate, is to register notice of the same accordingly; and when so registered such estate is to be an incumbrance appearing on the register.

By rule 170, the application is to be in form 49 in sched. 1 to the rules. The evidence in support must be delivered with the application. The notice is entered in the charges register.

It must, however, be remembered that under the Settled Land Act, 1882, a tenant by the curtesy, when in possession, has the powers of a tenant for life under the Act (sect. 58, *et ante*, p. 293); and he may therefore apply for registration under the Act of 1875, sect. 68, and the Act of 1897, s. 6, sub-ss. 1, 10 (see *ante*, p. 617).

Cautions against Registered Dealings.

How lodged.—By the Act of 1875, s. 53, any person interested under any unregistered instrument, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge be had on the part of the registered proprietor until notice has been served upon the cautioner.

The caution must be supported by an affidavit or declaration made by the cautioner or his agent.

But a person interested under a lease or agreement for a lease, or entitled to an estate in dower, or by the curtesy, of which notice respectively has been entered on the register, is not to be entitled to a caution in respect of such lease or estate in dower or by the curtesy.

By rules 188 and 189, a caution under sect. 53 is to be in form 53 in sched. 1 to the rules; and a caution against the registration of a possessory or qualified title as qualified or absolute is to be in form 54. The

caution must be signed by the cautioner or his solicitor, and must contain an address for service in the United Kingdom; and the declaration in support of the caution is to be in form 12, or to the like effect, and must refer to the land or charge to which it applies, and to the registered number of the title, and state the nature of the interest of the cautioner therein, &c.

By rule 6, cautions are to be entered in the proprietorship register.

By rule 192, a caution may be withdrawn on an application in form 56, signed by the cautioner or his solicitor. But this will not relieve the cautioner from any liability that may arise under sect. 56 of the Act, stated *infra*. (As to the Ecclesiastical Commissioners acting, see rule 193.)

It will be noticed that cautions under sect. 53 apply to land already registered.

Effect of caution.—By sect. 54, after the caution has been lodged, the registrar must not, without the consent of the cautioner, register any dealing with the land or charge until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of the prescribed number of days next ensuing the date at which such notice is served; and after the expiration of such time the caution is to cease unless an order to the contrary is made by the registrar, and upon such cessation the land or charge may be dealt with in the same manner as if no caution had been lodged.

By rule 190, the number of days are to be fourteen, or such other period (not being less than seven days) as the registrar may direct. The notice is to be in form 55 in sched. 1 to the rules. Any consent given by the cautioner under the above section is to be signed by him and attested. See also rule 191.

Delay and indemnity.—By sect. 55, if before the expiration of the said period the cautioner, or his agent, appears before the registrar, and gives sufficient security to indemnify every party against any damage that may be sustained by reason of any dealing with the land or charge being delayed, the registrar may, if he thinks fit, delay registering any dealing with the land or charge for such further period as he thinks just.

If the cautioner wants to further delay dealings with the registered land or charge, he can only obtain it by the high price of giving an indemnity, which possibly he may be unable to give. See, however, sect. 57, *infra*.

The security is usually by bond. (Brickd. and Sh. L. T. A., p. 188.)

Compensation for improper caution.—By sect. 56, if any person lodges a caution with the registrar without reasonable cause, he is to be liable to make to any person who may be damnified thereby such compensation as may be just, which is to be recoverable as a debt by the person damnified from the cautioner.

An appeal lies from the registrar to the court.

Inhibition against registered Dealings without Order of Court.

By sect. 57 of the Act of 1875, the court, or subject to an appeal to the court, the registrar, upon the application of any person interested in

any registered land or charge, may, after directing such enquiries (if any) to be made and notices to be given and hearing such persons as the court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named therein or generally until further order or entry, any dealing with any registered land or registered charge.

The court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions, and discharge such order or cancel such entry when granted, with or without costs, &c.

An appeal lies from the registrar to the court.

By rules 194 and 195, an application for an inhibition must either (1) be accompanied by the written consent of the registered proprietor of the land, or (2) be supported by the statutory declaration of the applicant, and such other evidence (if any) as the court or the registrar may require. In the absence of such consent of the registered proprietor, notice of the application must be given to him.

Power of Registered Proprietor to impose Restrictions.

By sect. 58 of the Act of 1875, as amended by the Act of 1897, schedule, when the registered proprietor of any land is desirous to place restrictions on transferring or charging such land, he may apply to the registrar to make an entry in the register that no transfer shall be made of or charge created on such land, unless the following things, or such of them as the proprietor may determine, are done; (that is to say,)

Unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar :

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge :

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

By sect. 59, the registrar shall thereupon, if satisfied of the right of the applicant to give such directions, make a note thereof on the register, and no transfer shall be made or charge created except in conformity with such directions; but the registrar is not to enter any of the above directions, except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that he may deem unreasonable, or calculated to cause inconvenience; and any such directions may at any time be withdrawn or modified at the instance of all the persons for the time being appearing by the registry to be interested in such directions, and shall also be subject to be set aside by the order of the court.

Sect. 58, after the word "desirous" contained the words "for his own sake, or at the request of some person beneficially interested in such land." These words are by the Act of 1897, schedule, repealed; and the section is to apply to charges as well as to land.

By rule 196, the application for the restriction is to be in form 57 in sched. 1 to the rules, and must state the particulars of the restriction

required. And an application to withdraw or modify a restriction must be in form 58, and must be signed by all persons for the time being appearing by the register to be interested in the restriction; and the signatures must be attested.

We have already shown that these sections, taken in conjunction with sect. 68, were utilised for the purpose of putting registered land into settlement (see *ante*, p. 617).

PROVISIONS SUPPLEMENTAL TO FOREGOING PARTS OF ACTS.

Caution against Entry of Land on Register.

Caution against registration.—By sect. 60 of the Act of 1875, any person having or claiming such an interest in any land which is not already registered as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice of any application that may be made for the registration of such land.

By sect. 61 the caution must be supported by an affidavit or declaration stating the nature of the interest of the cautioner, and the land to be affected thereby, &c.

By rule 74 the caution is to be in form 11 in sched. 1 to the rules, and must be signed by the cautioner or his solicitor and contain an address for service in the United Kingdom, and refer to and be accompanied by sufficient particulars, by plan or otherwise, to identify on the Ordnance Map the land to which the caution relates.

By rule 75, in the case of a manor, advowson, or other incorporeal hereditament, the names of the county and parish or place, &c., must also be furnished.

By rule 76, the statutory declaration in support of the caution must be in form 12 and be delivered with the caution.

By sect. 62, after lodgment of the caution, registration is not to be made of such land until notice has been served on the cautioner to appear and oppose, if he thinks fit, such registration, and the prescribed time has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, which may first happen.

It will be noticed that cautions under sects. 60 to 62 apply to cases only where the land is not yet registered.

By rule 77, the period limited by the notice is to be fourteen days, or such other period (not being less than seven days) as the registrar may direct. The notice is to be in form 13 in sched. 1 to the rules.

See also sect. 17 of the Act of 1875 (*ante*, p. 623), which provides that on the examination of a title by the registrar notice is to be given and an opportunity afforded to persons desirous of objecting, &c., to do so.

Compensation for improper caution.—By sect. 63 of the Act of 1875, if any person lodges a caution without reasonable cause, he is to be liable to make to any person who may be damnified thereby such compensation as may be just, which is to be deemed to be a debt due to the person damnified thereby.

By sect. 64 a caution lodged in pursuance of the Act is not to prejudice the claim or title of any person, and has no effect whatever except as in the Act mentioned.

Crown Lands.

Registration of Crown lands.—Sect. 65 of the Act of 1875 provides that as to land or any estate or right in land vested in the Crown, &c., or vested in any public officer or body in trust for the public service, the public officer or body having the management thereof (if any), or if none, then such person as the Crown may by sign manual appoint, may represent the owner of such land, estate, or right for all the purposes of the Act, and is to be entitled to such notices, and may make and enter any such application or caution, &c., as any owner of land, or of any estate, or right therein, is entitled to receive, make, enter, or do under the Act. As to land, or any estate or right in land belonging to the Duchy of Cornwall, then such person as the Duke of Cornwall, &c., may in writing appoint, may act, &c.

Land below high-water mark.—By sect. 66 of the Act of 1875, if it appears to the registrar that any land application for registration whereof is made comprises land below high-water mark at ordinary spring tides, he is not to register the land until he is satisfied that at least one month's written notice of the application has been given to the Board of Trade; and in case of land in the county palatine of Lancaster, also to the proper officer of the Duchy of Lancaster; and in case of land in the counties of Cornwall or Devon, also to the proper officer of the Duke of Cornwall; and in all other cases also to the Commissioners of Forests.^(a)

By the Act of 1897, schedule, the above section is not to apply to registration with a possessory title.

By rule 28, the fact that the land is so below high-water mark must be stated in the application to register; and the notices required by sect. 66 must be prepared by the applicant and served through the registry within seven days after the delivery of the application.

As to Proceedings on and before Registration.

Lands of different tenures.—Sect. 67 of the Act of 1875 makes provision as to the registration of lands of different tenures, intermixed and undistinguishable, which has already (*ante*, p. 612) been stated, with the rule applying thereto.

Trustees may sell by medium of registry.—By sect. 68 of the Act of 1875, any trustee, mortgagee, or other person having a power of selling land, may authorise the purchaser to make an application to be registered as first proprietor under the Act, and may consent to the performance of the contract being conditional on his being so registered, or may himself apply to be registered as such proprietor with the consent of the persons (if any) whose consent is required to the exercise by the applicant of his

(a) See 56 & 57 Vict. c. 54 (St. L. R. Act, 1893).

trust or power of sale ; and the costs and expenses properly incurred by such person therein are to be ascertained by the registrar ; and such person may retain or reimburse the same to himself out of any money coming to him under the trust or power, &c.

This section must be read in connection with sect. 5, sect. 7 (3), sect. 11, sect. 13 (4), and sect. 58, and sect. 6 of the Act of 1897 which have already (*ante*, pp. 614, 615, 617, 625) been considered.

Registration of part owners.—Sect. 69 of the Act of 1875 makes provision for the registration of part owners. This section is stated, *ante*, p. 618.

Disclosure of documents of title and facts.—Sect. 70 of the Act of 1875 makes provision for the disclosure of instruments of title and incumbrances affecting the title, &c. The effect of this section, with the rule applicable, is stated *ante*, p. 621.

Production of deeds.—Sect. 71 of the Act of 1875 provides for the production of deeds. The effect of the section is given, *ante*, p. 621.

Marking ends with notice.—Sect. 72 provides for the production of title deeds for the purpose of being marked with notice of registration. This section is stated *ante*, p. 621.

Costs.

By sect. 73 of the Act of 1875 all costs and expenses incurred by any parties in or about any proceedings for registration of land are, unless the parties otherwise agree, to be taxed by the taxing officer of the Chancery Division as between solicitor and client, but the persons by whom, and the proportions in which, such costs, &c., are to be paid are to be in the discretion of the registrar, regard being had to the rule that any applicant is liable *prima facie* to pay all costs and expenses incurred by or in consequence of his application, except in a case where parties object whose rights are sufficiently secured without their appearance, or where any costs or expenses are incurred unnecessarily or improperly ; but any party aggrieved by any order of the registrar may appeal to the court.

Disobedience of the order of the registrar may be punished by the court.

The following rules have, by L. T. R. 1898, been made as to costs :

269. All costs incurred in any proceeding in the registry shall be in the discretion of the registrar, having regard to the provisions as to costs contained in the Acts and these rules ; and shall, unless the parties otherwise agree, be taxed as the registrar shall direct by the taxing officers of the Chancery Division of the High Court of Justice. Any order made by the registrar as to costs may be enforced in the mode provided by sect. 73 of the Act of 1875 with respect to costs, charges, and expenses incurred in or about proceedings for registration of land.

270. All costs of and incident to the examination and proof of title (including fees of counsel) and the costs of all searches and inquiries in relation to the title shall be paid by the applicant.

271. The remuneration of a solicitor in, or incidental to, the registration of land and transactions respecting registered land,^(a) shall be regulated in the matters hereinafter mentioned as follows :

(A.) For the first registration of freehold or leasehold land with an absolute or qualified title, the remuneration of the solicitor having the conduct of the business shall be that prescribed in Part I. of the Second Schedule to the rules (stated *post*).

(B.) For the first registration of freehold or leasehold land with a possessory title, the remuneration of such solicitor shall be that prescribed in Part II. of the Second Schedule to the rules.

(C.) For every completed transfer, charge, exchange, or partition of registered land, or of a registered charge, where no title outside the register is investigated, the remuneration of such solicitor shall be that prescribed in Part II. of the Second Schedule to the rules.

(CO.) In applying the scale of remuneration in Part II. of Sched. II. to the entry of the first proprietorship of leasehold land on the original grant of the lease ; to the entry of first proprietorship of freehold land with a possessory title on a grant wholly or partly in consideration of a rent ; and to the registration of the transferee on a transfer of freehold land on a like occasion—the minimum remuneration shall be one guinea. (29th June, 1899.)

(D.) The remuneration prescribed by Part I. of the Second Schedule to the rules shall not apply when the title has been deduced or investigated by such solicitor on the occasion of a recent sale, purchase, or mortgage, nor shall it apply to the first registration of land on transfer from the register kept under the Land Registry Act, 1862.

(E.) When, on the occasion of a purchase of unregistered land, the purchaser's solicitor receives the remuneration fixed by the Remuneration Order, 1882,^(b) his remuneration for registering a possessory title thereon shall not exceed 2*l.* 2*s.* in cases where the value does not exceed 5000*l.*, and in cases where the value exceeds 5000*l.* shall be 5*l.* 5*s.*

(F.) In all cases in which a solicitor would be entitled to charge under Part I. of Schedule I. of the Remuneration Order, 1882, for negotiating a sale, purchase, or loan, or for conducting a sale by auction, he shall be entitled to make the same charges in respect of a similar transaction respecting registered land.

(G.) The remuneration hereby authorised shall not include the disbursements, extra work, business, or proceedings which, under sect. 4 of the Remuneration Order, 1882, are not to be included in the remuneration prescribed by Schedule I. to that Order.

(H.) When a solicitor is concerned for the proprietor of land, and also for a person taking a charge thereon, he is to be entitled to receive the

(a) Rule 1 of the general order made under the Solicitors' Remuneration Act, 1881 (*ante*, p. 600), expressly excludes dealings with land registered under the Land Registration Act, 1862 and the Land Transfer Act, 1875. The above rule deals with the solicitor's remuneration in regard to registered land.

(b) See *ante*, p. 600.

the solicitor of the person taking the charge and one-half of what would be allowed to the proprietor's solicitor up to 5000*l.*, and above 5000*l.* one-fourth thereof.

A solicitor conducting the business acts on behalf of several distinct interests proper to be separately represented, he is to be paid for each such party after the first an additional 2*l.* 2*s.* in each case.

Each solicitor, before undertaking the business, by writing a declaration to the client, elect that his remuneration shall be regulated by the Remuneration Order, 1882, excepting Schedule I.

In all transactions respecting registered land, the remuneration for which is not hereby provided for, the Remuneration Order, 1882, excepting Part I. of Schedule I. to that Order, shall regulate the remuneration of the solicitor.

Doubtful Questions arising on Title.

Registrar may state case for opinion of court.—Sects. 74 and 75 of the Act of 1875 empower the registrar, upon the examination of a title, in case of doubt thereon, and upon the application of any party interested in the land, to refer a case for the opinion of a superior court, &c., which opinion is to be conclusive on the parties, &c. And sects. 76 and 77 give power to the court to bind the interests of married women, idiots, lunatics, and persons beyond seas or unborn. The effect of these sections is stated *ante*, p. 622.

Land Certificates, Office Copies of Leases, and Certificates of Charge.

Loss of certificate, &c.—Sect. 78 of the Act of 1875 enacted as to the loss of the land certificate, office copy, registered lease, or certificate of charge; but this section is by the Act of 1897, schedule, repealed and replaced by sect. 8 (3) of the latter Act, which is set out *ante*, p. 644.

Renewal of certificate, &c.—Sect. 79 of the Act of 1875 provides for the renewal of a land certificate, &c. This section is stated *ante*, p. 644.

Land certificate, &c., to be evidence.—Sect. 80 enacts as to this, and is set out *ante*, p. 644.

Effect of deposit of land certificate.—Sect. 81 provided as to the effect of the deposit of a land certificate or office copy registered lease creating a lien. This section is, however, repealed by the Act of 1897, schedule 1, and is replaced by sect. 8 (4) of that Act, which is set out *ante*, p. 636.

Special Hereditaments.

Advowsons, &c.—Sect. 82 of the Act of 1875, as amended by the Act of 1897, schedule, provides for the registration of advowsons and other incorporeal hereditaments. The section is given *ante*, p. 612.

deceased or bankrupt proprietor held the same; but, save as aforesaid, he shall in all respects, and in particular as respects any registered dealings with such land or charge, be in the same position as if he had taken it under a transfer for value.

This section must now be read in connection with the Act of 1897, sects. 1 to 4, already (*ante*, pp. 29 to 32) considered, and sect. 43 and rules, stated *ante*, p. 650.

Evidence of transmission.—By sect. 47, the fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner.

See the remarks made *ante* under sects. 41, 42, and 43, and rules there stated.

Sect. 48 of the Act of 1875 is repealed by sect. 30 of the Conveyancing Act of 1881 (see *ante*, p. 26).

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Unregistered dispositions.—By sect. 49 of the Act of 1875, the registered proprietor alone is to be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest therein, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

The registered proprietor alone is entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

By the Act of 1897, schedule, this section includes power to sever mines and minerals from the surface.

It will be seen that by sect. 49 of the Act of 1875 the registered proprietor—or, subject to his estate, any other person having a sufficient estate or interest—may create estates, &c., in the *same manner* as he might do if the land were *not* registered. And the registered proprietor may, it seems, after creating any such estates, &c., by a registered disposition, transfer the land and so defeat the estates he has created. For as already shown (*ante*, p. 617), by the Act of 1897, schedule, neither the registrar nor any person dealing with registered land or a charge are to be affected with notice of a trust, &c. The only protection that an unregistered owner of equities has, as against the registered proprietor, is the power to

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Sect. 50 of the Act of 1875 after the word “land” contained the words “made subsequently to the last transfer of the land on the register.” These words are by the Act of 1897, schedule, repealed.

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The Acts contain no special provision enabling the registered proprietor as such to grant a lease. But a lease may be granted under sect. 49 of the Act of 1875, stated *supra*, and if of sufficient duration be registered under sect. 11, or notice thereof entered under sect. 50. The form of the lease will be the same as under the ordinary practice; but should have a plan of the parcels endorsed.

Mode of registration.—By the combined effect of sect. 51 and rule 166, upon an application to register notice of the lease or agreement, such lease or agreement, together with a copy thereof, and a copy or tracing of the plan (if any) thereon, and either the written consent of the registered proprietor of the freehold, or of the superior lease out of which the lease or agreement of which notice is to be registered is derived, or an order of the court authorising the registration of the notice, must be delivered at the registry, and thereupon the registrar will enter the notice. And by rule 166A. (29th June, 1899), where the lease or sub-lease is by way of security for money, the land certificate of the lessor or sub-lessor must be produced and indorsed with a note of the entry. By the Act, 1897, sched. 1, however, a term created for mortgage purposes is not to be deemed a lease within sect. 11 of the Act of 1875 (*ante*, p. 625).

By rule 167, if the lease or agreement comprises only part of the land in the title, and does not contain sufficient particulars (by plan or otherwise)

to enable such part to be clearly shown on the filed plan of the land, the applicant (with the concurrence of the necessary parties, if any) must furnish the necessary information.

By rule 168, the notice in the register must refer to the filed copy of the lease or agreement and give the term, &c. Any right of pre-emption must also be noted. The lease or agreement is marked with a note of the entry and returned to the applicant.

By rule 169, if the lease or agreement is not produced, a statutory declaration by the applicant or his solicitor, stating the reason why and verifying the copy, must be furnished.

See also rule 53 as to notice of registration of a lease, stated *ante*, p. 627, and rules 181 and 182, as to noting the determination of a lease. stated *ante*, p. 631.

Notice of Estates in Dower or by the Curtesy.

By sect. 52 of the Act of 1875, any person entitled to an estate in dower or by the curtesy in any registered land may apply to register notice of such estate; and the registrar, if satisfied of the title of such person to such estate, is to register notice of the same accordingly; and when so registered such estate is to be an incumbrance appearing on the register.

By rule 170, the application is to be in form 49 in sched. 1 to the rules. The evidence in support must be delivered with the application. The notice is entered in the charges register.

It must, however, be remembered that under the Settled Land Act, 1882, a tenant by the curtesy, when in possession, has the powers of a tenant for life under the Act (sect. 58, *et ante*, p. 293); and he may therefore apply for registration under the Act of 1875, sect. 68, and the Act of 1897, s. 6, sub-ss. 1, 10 (see *ante*, p. 617).

Cautions against Registered Dealings.

How lodged.—By the Act of 1875, s. 53, any person interested under any unregistered instrument, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge be had on the part of the registered proprietor until notice has been served upon the cautioner.

The caution must be supported by an affidavit or declaration made by the cautioner or his agent.

But a person interested under a lease or agreement for a lease, or entitled to an estate in dower, or by the curtesy, of which notice respectively has been entered on the register, is not to be entitled to a caution in respect of such lease or estate in dower or by the curtesy.

By rules 188 and 189, a caution under sect. 53 is to be in form 53 in sched. 1 to the rules; and a caution against the registration of a possessory or qualified title as qualified or absolute is to be in form 54. The

caution must be signed by the cautioner or his solicitor, and must contain an address for service in the United Kingdom; and the declaration in support of the caution is to be in form 12, or to the like effect, and must refer to the land or charge to which it applies, and to the registered number of the title, and state the nature of the interest of the cautioner therein, &c.

By rule 6, cautions are to be entered in the proprietorship register.

By rule 192, a caution may be withdrawn on an application in form 56, signed by the cautioner or his solicitor. But this will not relieve the cautioner from any liability that may arise under sect. 56 of the Act, stated *infra*. (As to the Ecclesiastical Commissioners acting, see rule 193.)

It will be noticed that cautions under sect. 53 apply to land already registered.

Effect of caution.—By sect. 54, after the caution has been lodged, the registrar must not, without the consent of the cautioner, register any dealing with the land or charge until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of the prescribed number of days next ensuing the date at which such notice is served; and after the expiration of such time the caution is to cease unless an order to the contrary is made by the registrar, and upon such cessation the land or charge may be dealt with in the same manner as if no caution had been lodged.

By rule 190, the number of days are to be fourteen, or such other period (not being less than seven days) as the registrar may direct. The notice is to be in form 55 in sched. 1 to the rules. Any consent given by the cautioner under the above section is to be signed by him and attested. See also rule 191.

Delay and indemnity.—By sect. 55, if before the expiration of the said period the cautioner, or his agent, appears before the registrar, and gives sufficient security to indemnify every party against any damage that may be sustained by reason of any dealing with the land or charge being delayed, the registrar may, if he thinks fit, delay registering any dealing with the land or charge for such further period as he thinks just.

If the cautioner wants to further delay dealings with the registered land or charge, he can only obtain it by the high price of giving an indemnity, which possibly he may be unable to give. See, however, sect. 57, *infra*.

The security is usually by bond. (Brickd. and Sh. L. T. A., p. 188.)

Compensation for improper caution.—By sect. 56, if any person lodges a caution with the registrar without reasonable cause, he is to be liable to make to any person who may be damnified thereby such compensation as may be just, which is to be recoverable as a debt by the person damnified from the cautioner.

An appeal lies from the registrar to the court.

Inhibition against registered Dealings without Order of Court.

By sect. 57 of the Act of 1875, the court, or subject to an appeal to the court, the registrar, upon the application of any person interested in

any registered land or charge, may, after directing such enquiries (if any) to be made and notices to be given and hearing such persons as the court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named therein or generally until further order or entry, any dealing with any registered land or registered charge.

The court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions, and discharge such order or cancel such entry when granted, with or without costs, &c.

An appeal lies from the registrar to the court.

By rules 194 and 195, an application for an inhibition must either (1) be accompanied by the written consent of the registered proprietor of the land, or (2) be supported by the statutory declaration of the applicant, and such other evidence (if any) as the court or the registrar may require. In the absence of such consent of the registered proprietor, notice of the application must be given to him.

Power of Registered Proprietor to impose Restrictions.

By sect. 58 of the Act of 1875, as amended by the Act of 1897, schedule, when the registered proprietor of any land is desirous to place restrictions on transferring or charging such land, he may apply to the registrar to make an entry in the register that no transfer shall be made of or charge created on such land, unless the following things, or such of them as the proprietor may determine, are done; (that is to say,)

Unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar:

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge:

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

By sect. 59, the registrar shall thereupon, if satisfied of the right of the applicant to give such directions, make a note thereof on the register, and no transfer shall be made or charge created except in conformity with such directions; but the registrar is not to enter any of the above directions, except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that he may deem unreasonable, or calculated to cause inconvenience; and any such directions may at any time be withdrawn or modified at the instance of all the persons for the time being appearing by the registry to be interested in such directions, and shall also be subject to be set aside by the order of the court.

Sect. 58, after the word "desirous" contained the words "for his own sake, or at the request of some person beneficially interested in such land." These words are by the Act of 1897, schedule, repealed; and the section is to apply to charges as well as to land.

By rule 196, the application for the restriction is to be in form 57 in sched. 1 to the rules, and must state the particulars of the restriction

required. And an application to withdraw or modify a restriction must be in form 58, and must be signed by all persons for the time being appearing by the register to be interested in the restriction; and the signatures must be attested.

We have already shown that these sections, taken in conjunction with sect. 68, were utilised for the purpose of putting registered land into settlement (see *ante*, p. 617).

PROVISIONS SUPPLEMENTAL TO FOREGOING PARTS OF ACTS.

Caution against Entry of Land on Register.

Caution against registration.—By sect. 60 of the Act of 1875, any person having or claiming such an interest in any land which is not already registered as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice of any application that may be made for the registration of such land.

By sect. 61 the caution must be supported by an affidavit or declaration stating the nature of the interest of the cautioner, and the land to be affected thereby, &c.

By rule 74 the caution is to be in form 11 in sched. 1 to the rules, and must be signed by the cautioner or his solicitor and contain an address for service in the United Kingdom, and refer to and be accompanied by sufficient particulars, by plan or otherwise, to identify on the Ordnance Map the land to which the caution relates.

By rule 75, in the case of a manor, advowson, or other incorporeal hereditament, the names of the county and parish or place, &c., must also be furnished.

By rule 76, the statutory declaration in support of the caution must be in form 12 and be delivered with the caution.

By sect. 62, after lodgment of the caution, registration is not to be made of such land until notice has been served on the cautioner to appear and oppose, if he thinks fit, such registration, and the prescribed time has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, which may first happen.

It will be noticed that cautions under sects. 60 to 62 apply to cases only where the land is not yet registered.

By rule 77, the period limited by the notice is to be fourteen days, or such other period (not being less than seven days) as the registrar may direct. The notice is to be in form 13 in sched. 1 to the rules.

See also sect. 17 of the Act of 1875 (*ante*, p. 623), which provides that on the examination of a title by the registrar notice is to be given and an opportunity afforded to persons desirous of objecting, &c., to do so.

Compensation for improper caution.—By sect. 63 of the Act of 1875, if any person lodges a caution without reasonable cause, he is to be liable to make to any person who may be damnified thereby such compensation as may be just, which is to be deemed to be a debt due to the person damnified thereby.

he is guilty of a misdemeanor, and upon conviction on indictment is liable to the same punishment or fine as is mentioned in sect. 99.

Civil remedy remains.—By sect. 102, no proceeding or conviction for any such misdemeanor is to affect any remedy which any aggrieved person may be entitled to, either at law or in equity.

Discovery.—By sect. 103, nothing in the Act is to entitle any person to refuse to make a complete discovery in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or bankruptcy; but no answer to any such question or interrogatory is to be admissible in evidence against him in any criminal proceeding under the Act.

Inspection of Register.

Sect. 104 of the Act of 1875, as amended by the Act of 1897, sect. 22 (7), and the rules applying thereto, regulate the practice as to inspection of the register. The effect of these sections and rules is stated, *ante*, p. 639.

Saving Clause.

By sect. 105 of the Act of 1875 nothing therein is to affect any right of Her Majesty to any escheat or forfeiture.

ADMINISTRATION OF LAW.

Office of Land Registry.

Sect. 106 of the Act of 1875 provides for an office of land registry in London, and the appointment and payment of a registrar and other officers thereof.

By the Land Registry Act of 1886 (49 Vict. c. 1), provision was made for the conduct of the land registry office during a vacancy of the office of registrar, &c. And by the Act of 1897, sect. 22 (1), the powers of the Lord Chancellor under sect. 106 of the Act of 1875 are enlarged.

Sect. 107 of the Act of 1875 provides that there shall be a seal for the office of land registry.

Sect. 108 makes provision for certain duties to be performed by the registrar.

Summoning witnesses, &c.—By sect. 109, the registrar or any officer of the registry authorised by him in writing may administer an oath or take a voluntary declaration for the purposes of the Act; and the registrar may summon the attendance of persons in relation to the registration of any title; or to produce any map, survey, or book made or kept under any statute for his inspection; he may examine upon oath any person appearing before him; and may allow him the reasonable charges of his attendance, which are to be deemed to be charges incurred in or about proceedings for registration of land, and dealt with accordingly.

By the Act of 1897, sect. 8 (1), the registrar is to have the same powers of compelling the production of land certificates, office copies of registered

leases, and certificates of charges, as he has under sect. 109 of the Act of 1875 to compel the production of maps, &c.

By rule 267, if the person summoned is not bound to attend or produce at his own expense, the declaration verifying service must also prove that his reasonable charges were paid or tendered to him.

By rule 268, the registrar is to have the like power with regard to the issue of summonses in respect to any proceeding in the registry as is conferred on him by sect. 109 of the Act of 1875 in relation to the registration of any title.

By rule 261, statutory declarations to be used in the course of registration may be made before the registrar, or any officer of the registry authorised by him in writing, or before any person authorised by law to take statutory declarations. If made for the immediate purpose of being filed, read, or used in the registry, they are not chargeable with stamp duty. The registrar may require evidence to be given *viva voce* before him on oath. All declarations are to be filed in the office, and office copies thereof are to be taken for use.

By sect. 110, if the person summoned does not attend, or does not produce the maps, &c., he incurs a penalty not exceeding 20*l.*, to be recovered on summary conviction; provided the reasonable charges of his attendance and of the production of such documents be paid or tendered to him.

See rules 267, 268, set out *supra*.

Power to make general rules—By sect. 111 of the Act of 1875 as amended by the Act of 1897, sect. 22 (2), power is given to the Lord Chancellor, with the advice and assistance there specified, to make general rules as to the registry, forms, the custody of instruments, costs, &c., which rules are to be of the same force as if enacted in the Act. They are, however, to be first laid before Parliament, as directed by the Act.

The Act of 1897, sect. 22 (6), also extends the purposes for which general rules may be made to purposes for carrying out the provisions of the latter Act as to compulsory registration (*post*); for adapting to the registration of proprietors of leasehold land the provisions of the Act of 1875, as to absolute and possessory titles and as to land certificates (*ante*, p. 627); for the conduct of official researches (*ante*, p. 639); for applying to the grant of leases and dealings with leasehold land the provision of the Act as to compulsory registration, &c.

The general rules thus authorised were issued on the 2nd August, 1898, and amended by rules of 29th June, 1899, and are set out in their proper order in these pages.

As to fees.—Sect. 112 of the Act of 1875, as amended by sect. 22 (3, 4, 5) of the Act of 1897, provides that general rules may be made as to the amount of fees payable (1) in the case of the registration of land or transfer of land on a sale, regard being had to the value of the land as determined by the amount of purchase money; and (2) if not upon a sale, to the value of the land to be duly ascertained; and (3), in case of the registration or transfer of a charge, to the amount of the charge.

Fee rules under this section were issued 27th October, 1898, and will be found *post*.

By rules 263 and 264, no entry is to be made in the register until all stamps in respect of the fees payable have been impressed or affixed on some document delivered at the registry (which are immediately to be defaced), and all expenses payable have been paid or provided for.

By rule 265, to enable the registrar to determine the fees payable when the value of the land does not appear on the face of documents produced, the registrar will, in ordinary cases, receive as evidence a written certificate of value by a solicitor in form 65 in sched. 1 to the rules, which is exempted from stamp duty.

Sect. 113 of the Act of 1875, as to mode of taking fees, is repealed by the Stat. Law Revision Act, 1883. See now 42 & 43 Vict. c. 58.

Description of the Court—Appeal.

The Court.—By sect. 114 of the Act of 1875, “the court” means the Court of Chancery or the county court, according as the one or other of such courts may be prescribed by general rules.

Where the county court has jurisdiction under the Act, it is to have all the powers of the Court of Chancery therein.

By sect. 115 the Lord Chancellor may assign the duties vested in the Court of Chancery in relation to matters under the Act to any particular judge or judges of that court.

By rule 234, all jurisdiction, powers, and duties by the Acts or the rules expressed to be vested in the Court of Chancery, or in the court, including any appeal under sect. 116 of the Act of 1875 (*infra*), are until further order to be assigned to and performed by the senior judge for the time being of the Chancery Division of the High Court, &c.

Appeal.—By sect. 116 of the Act of 1875, any person aggrieved by any order of a judge of a county court may appeal to the court (as above defined).

By sect. 117, an order made under the Act by the court, otherwise than on appeal from a county court, may be appealed against within the prescribed time, in the same manner and with the same incidents in and with which orders made by the court on cases within its ordinary jurisdiction may be appealed from.

The practice as to appeals generally is chiefly regulated by rules 231 to 247. In all mere formal matters the decision of the registrar is final, unless he or the court gives leave to appeal (rule 231). In all other cases, questions arising before the registrar as to title, incumbrance, charge, or matter noted in or omitted from the register, &c., or as to any claim for indemnity, are to be determined by him, subject to an appeal to the court (see rules 232, 233; and see rule 235, stated *ante*, p. 666).

Applications to the court on reference by or appeal from the register are to be by summons in form 64 in sched. 1 to the rules. But an appeal from a county court judge is to be by motion (rules 236, 237).

The person served with the summons need not enter an appearance (rule

238). If any party fails to attend at the hearing, or any adjournment thereof, the court is to have the powers given by R. S. O. Ord. liv., rules 5 to 7 (rule 240 ; and see rule 241). No appeal lies from the decision of the registrar or order of the court after twenty-one days from the date of the decision or order without leave of the court or of the Court of Appeal (rule 244). And no such appeal is to affect any dealing for value which has been duly registered before a written notice of the intention to appeal has been delivered at the registry on the appellant's part (rule 245). Subject to provisions as to costs in the Acts, the costs of the appeal, &c., are to be in the discretion of the court (rule 247).

As to District Registries.

By sect. 118 of the Act of 1875, as amended by the Act of 1897, sect. 22 (8), the Lord Chancellor, with the concurrence of the Treasury, may by order (1) create district registries for the purposes of registration of land within the defined districts respectively, &c. ; and (2) may direct, by notice in the *London Gazette*, when such registration is to commence, and the place where lands are to be registered ; and (3) may appoint district registrars, assistant district registrars, &c., to perform the business of registration in any district.

By the Act of 1897, s. 22 (8), general orders may be made under sect. 118 for modifying the provisions of the Act with respect to district registries, &c.

Sect. 119 of the Act of 1875 provides for the qualification of district and assistant district registrars.

By sect. 120, each district registry is to have a seal, &c.

Sect. 121, subject to general rules, provides as to the powers and indemnity of district and assistant district registrars, as to appeals from them, &c.

By sect. 122, the general orders, rules, forms, directions, and fees for the time being applying to and payable in the office of land registry are also to apply to and be payable in all the district registries, &c.

Temporary Provisions.

Sect. 123, provided for the transfer of the then existing staff of officers attached to the office of land registry constituted under the Act of 1862, to the office of land registry constituted under the Act of 1875.

Sect. 124 provided for the transfer of books and papers.

By sect. 125, application for the registration of an estate under the Land Registry Act of 1862 shall not be entertained.

By sect. 126, the Lord Chancellor may, by order, provide for the registration under the Act of 1875, without cost to the parties interested, of all titles registered under the Land Registry Act, 1862, and any order so made is to have the same effect as if it were enacted in this Act ; *nevertheless it is not obligatory on any person interested in an estate registered under the said Land Registry Act, 1862, to cause such estate to be registered*

under this Act, and until such estate is registered under this Act, the Act of 1862 shall apply thereto in the same manner as if this Act had not passed.

By the Act of 1897, schedule, the words printed in italics in the above section are repealed.

Local Registries.

By sect. 127 of the Act of 1875, any land situate within the jurisdiction of (1) the local registry for the county of Middlesex; or (2) the local registry for the West Riding of Yorkshire; or (3) the local registry for the North Riding of Yorkshire; or (4) the local registry for the East Riding of Yorkshire and the town and county of the town of Kingston-upon-Hull shall, if registered under this Act, from and after the date of the registration thereof, be exempt from such jurisdiction; and no document relating to any such registered land executed and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as last aforesaid shall be required to be registered in any of the said local registries.

By the Act of 1897, schedule, the above section is not to apply to estates and interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the land.

By sect. 23 of the Act of 1897, provision is made for the transfer, under an agreement between the Lord Chancellor and the County Council of any of the three ridings of Yorkshire, of the business of the local deed registry established therein to the office of the land registry.

See also Land Registry Middlesex Deeds Act, 1891 (54 & 55 Vict. c. 64), sched. 1, r. 14, set out *ante*, p. 158.

Removal of Land from Registry.

By the Act of 1897, s. 17 (1.), the registered proprietor of land not situated in a district where the registration of title is compulsory, may, with the consent of the other persons (if any) for the time being appearing by the register to be interested therein, and on delivering up the land certificate or office copy of the registered lease and certificates of charge (if any), remove the land from the register.

(2.) After land is so removed, no further entries can be made respecting it, and inspection of the register may be made and office copies of entries made therein may be issued.

(3.) If the land so removed is situate within the jurisdiction of the Middlesex or Yorkshire registries named in sect. 127 of the Act of 1875, it is to be again subject to such jurisdiction as from the date of its removal.

By rule 230, the last registered proprietor may for a period of two years after such removal inspect the register and have office copies of the

entries. After the two years an order of the registrar is necessary for such purposes.

COMPULSORY REGISTRATION AND INSURANCE FUND.

Power to require compulsory registration.—By the Act of 1897, s. 20. (1.) the Queen may, by Order in Council, declare, as respects any county or part of a county defined therein, that, on and after a day therein specified, registration of title to land is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land.

(2.) In this section “conveyance on sale” means an instrument executed on sale by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the Act of 1875.

(3.) The title with which a proprietor of freehold land is registered in pursuance of this section shall be not less than a possessory title; but nothing in this section shall prevent any person from being registered with any other title if the registrar is satisfied of his title.

(4.) Any order in council may be varied or revoked.

(5.) In the case of every proposed order, notice shall, six months before the order is made, be given to the council of the county to which it is proposed to be applied. A draft of the proposed order, together with the name of at least one place within or conveniently near to the county where a district registry office will be established, shall accompany the notice, and shall also be published in the *Gazette*.

(6.) If within three months after receipt of the draft the county council, at a meeting specially called for the purpose, at which two-thirds of the whole number of the members shall be present, resolve, and communicate to the Privy Council their resolution, that in their opinion compulsory registration of title would not be desirable in their county, the order shall not be made.

(7.) The first order made under this section shall not affect more than one county.

(8.) Except as to a county or part of a county which shall have signified through the county council of such county pursuant to a resolution of such council passed at a meeting at which two-thirds of the whole number of the members shall be present, its desire that registration of title shall be compulsorily applied to it, no further order shall be made under this section, and in any case no further order shall be made until the expiration of three years from the making of the first order. Provided that in the case of an order made under this sub-section the provisions of sub-section (6) shall not apply.

(9.) Every Order of Council made under this section shall, within thirty days from the date thereof, if Parliament be then sitting, or within twenty days from the commencement of the next session, if Parliament be not sitting, be laid on the table of both Houses of Parliament, and if within

forty days of any order being so laid an Address in either House disapproving of such order be carried, such order shall be void and of no effect.

(10.) Any order made under this section shall be made with due regard to the utilisation (if practicable) of any land registry existing in the county to which compulsory registration is proposed to be applied or in any adjoining county.

(11.) For the purposes of this section the word county shall have the same meaning as in the Local Government Act, 1888 (51 & 52 Vict. c. 41), and shall include a county borough ; and the words county council shall include the council of such borough.

(12.)—(i.) In the event of any portion of a county or part of a county, as regards which an order has been made under this section, being included in another county or in a county borough as regards which no order has been made under this section, such order shall cease to be in force within such included portion of the county.

(ii.) In the event of any portion of a county or part of a county as regards which no order has been made under this section being included in another county or in a county borough as regards which an order has been made under this section, such order shall apply to such included portion of the county.

ORDERS IN COUNCIL.

Pursuant to the foregoing section it was on the 18th of July, 1898, ordered and declared, with respect to the County of London, as follows :—

Registration of Title to Land is to be compulsory on sale in the several portions of the county mentioned in the first column of the schedule hereto, on and after the respective days mentioned in the second column of the same schedule.

In this order “ parish ” means a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed, and the boundaries of each such parish shall be those constituted and limited at the date of this order.

This order may be amended or added to or repealed by Order in Council.

The Schedule.

Portions of the County.	Days on and after which Registration of Title to Land is to be compulsory on sale.
The parishes of Hampstead, Saint Pancras, Saint Marylebone, and Saint George's, Hanover-square... ..	1st November, 1898.
The parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, Saint George's in the East, Shadwell, Ratcliffe, Limehouse, Bow, Bromley, and Poplar	1st March, 1899.
The remainder of the County (not including the City of London) North of the centre line of the River Thames except North Woolwich	1st October, 1899.
The remainder of the County not including the City of London	1st January, 1900.
The City of London	1st July, 1900.

On the 28th of November, 1899, however, the following Order in Council was issued :—

Whereas it is expedient, as regards certain portions of the County of London, that the operation of the Order in Council, dated the 18th of July, 1898, and made pursuant to the Land Transfer Act, 1897, should be postponed: And it is ordered that, as regards the hereunder-mentioned portions of the said county, the said order is to be read and to take effect as if the schedule thereto had been expressed as follows :—

Portions of the County.	Days on and after which Registration of Title to Land is to be compulsory on Sale.
The parishes of Christ Church (Southwark), St. George the Martyr, Camberwell, Horselydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olave and St. Thomas, St. Saviour and the detached part of the parish of Streatham situate between the parishes of Lambeth and Camberwell	1st January, 1900.
The parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the remainder of the parish of Streatham	1st May, 1900.
The remainder of the County, except the City of London ...	1st November, 1900.
The City of London	1st May 1901.

It will be noticed that under sect. 20 (1) registration is to be compulsory only on a *sale*; and that until registration no *legal* estate in *freehold* land is to be acquired under the conveyance. Land is defined by sect. 24 (1) of the Act of 1897, set out *ante*, p. 614, and thereby certain property is excluded from compulsory registration of title.

And by rule 58, an Order in Council made under sect. 20 (1) is, in the absence of anything to the contrary in the order, to extend also to sales of leasehold land, and to grants of leases and underleases. And by rule 59, the effect of such an order shall be that as regards land in the county or part of a county comprised in the order, an assignment on sale of a lease or underlease, having at least forty years to run, or two lives yet to fall in, and a grant of a lease or underlease for a term of forty years or more, or two or more lives, executed after the day specified in the order, and capable of registration, shall operate only as an agreement, and shall not pass any legal estate to the assignee or lessee until he is registered proprietor of the lease or underlease.

“Assignment” and “grant of a lease or underlease” in the preceding rule are to apply to any instrument by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of leasehold land may be made. (Rule 4, June 29, 1899, rescinding and replacing rule 60 of L. T. R. 1898.)

As to the meaning of the word county, by the Local Government Act, 1888, s. 100, the expression “county,” if not inconsistent with the context, does not include a county of a city or county of a town.

By the same section, however, "administrative county" means the area for which a county council is elected, but does not (except where expressly mentioned) include a county borough.

It will be noticed that by sect. 20 (11) of the Act of 1897, not only is the word county to have the same meaning as in the L. G. A. 1888, but is to include a county borough, &c.

Conveyance and mortgage.—By rule 78, when a conveyance on sale of land in any county or part of a county in which registration of title is compulsory on sale, and a disposition thereof by the purchaser are delivered for registration within fourteen days after the date of the conveyance, the disposition is to have the same effect as if it had been executed subsequently to the registration of the purchaser as proprietor of the land. If the land is leasehold, the words "conveyance on sale" are to apply to a grant or assignment of a lease or sub-lease, and the word "purchaser" to a grantee, lessee, or assignee.

A disposition under the above rule, which if made by a registered proprietor is required to be in a prescribed form, must be made in accordance with such form. (Rule 78 A., June 29, 1899.)

FORMS IN SCHEDULE 1 TO RULES, 1898.

The first schedule to the rules of 1898, made under the Land Transfer Acts, sets out the forms for use in the registry on the registration of a title, &c., under the Acts; and as the ordinary printed forms are supplied free of charge to applicants for registration (rule 266), only the most important of such forms are given hereunder, leaving merely the head notes as to the others, thus showing all the forms given by the rules.

THE FIRST SCHEDULE TO THE RULES.

FORM 1.—*Application for Registration with a Possessory Title.* (*Ante*, p. 619.)

LAND REGISTRY.

Land Transfer Acts, 1875 and 1897.

I, A. B. of &c., hereby apply to be registered as proprietor with possessory title of the land in the parish of _____ shown and edged with red on the accompanying plan (or comprised in the accompanying deed, or any other particulars sufficient to enable the land to be fully identified on the Ordnance map) the value of which, with all buildings and timber thereon, does not, to the best of my belief, exceed _____ l.

Where it is desired that a particular verbal description be entered in the register, add I also desire the following verbal description to be entered on the register:—

(Fill in the proposed verbal description.)

To be signed by the applicant or his solicitor.

FORM 2.—Statutory Declaration by an applicant for Registration with a Possessory Title. (*Rule 17 ; et ante, pp. 619, 620.*)

(Heading as in Form 1.)

I, A. B., of &c., solemnly and sincerely declare as follows:—

That I am in possession [or receipt of the rents and profits] of the land shown and edged with red on the plan [and—if it is desired that a particular verbal description be entered on the Register—described in the verbal description], now produced and shown to me marked [and] and that I am entitled thereto in fee simple for my own benefit (*or otherwise as the case may be*), and that the value of the land, with all buildings and timber thereon, does not, to the best of my belief, exceed l.

And I make, &c.

N.B.—If sufficient particulars to enable the land to be fully identified on the Ordnance map can be furnished without a plan, no plan need be exhibited, and the declaration can be altered accordingly.

If the declaration is made by the solicitor, the form must be altered accordingly, and the deponent must be described as the solicitor of the applicant.

FORM 3.—Application for Registration with an Absolute Title. (*Rule 25 ; et ante, p. 621.*)

(Heading as in Form 1.)

I, A. B., of &c., hereby apply to be registered as proprietor with absolute title of the land in the county of and parish of known as consisting of [*fill in short particulars of the land sufficient to identify it*] the value of which, with all buildings and timber thereon, does not, to the best of my belief, exceed l.

To be signed by the applicant or his solicitor.

FORM 4.—Form of Advertisement in the "London Gazette" of an application for an Absolute Title. (*Rule 33 ; et ante, p. 622.*)

FORM 5.—Statutory Declaration on Completion of an Absolute or Qualified Title. (*Rule 41 ; et ante, p. 621.*)

(Heading as in Form 1.)

Application, No. .

We, A. B., of &c., and C. D., of, &c., solicitor, severally solemnly and sincerely declare, to the best of our respective knowledge, information, and belief, as follows:—

1. That all deeds, writings, and instruments of title, and all leases, charges, and incumbrances affecting the title to the land which is the subject of the above-mentioned application, and all facts material to such title, have been disclosed in the course of the investigation of the said title made by the Registrar.

2. That the map marked "A" now produced to us comprises, within the part edged with red, the whole of such land, and no more than such land.

3. That the actual possession, or receipt of the rents and profits, of such land is in accordance with the title of the applicant as deduced to the registrar, and that the value of the land with all buildings and timber thereon [*or of the leasehold interest*] does not exceed l.

4. That the said applicant is not a bankrupt, nor has any receiving order been made against him.

5. That there is no judgment, *lis pendens*, land charge, or other similar incumbrance, registered or unregistered, in existence affecting the said land.

6. That the means of our respective knowledge, information, and belief are as follows (that is to say):—[*fill in means of knowledge, &c.*].

And we severally make, &c.

NOTE.—If the applicant has no solicitor the declaration may be altered accordingly.

FORM 6.—*Restriction and Inhibition where the Tenant for Life is registered as Proprietor, and there are Trustees of the Settlement, and powers of charging for special purposes. (Rules 71 and 82; et ante, p. 615.)*

Restriction.—Until further order no transfer of the land is to be made except on sale or exchange, and the purchase moneys on sale are to be paid to A. B., of, &c., and C. D., of, &c. [*the trustees of the settlement*], or into court. No sale of the house and land shown and edged red on the plan attached hereto is to be made without the consent of the said A. B. and C. D. or of the court, and no charge is to be created without the consent of A. B. and C. D. (*Or where the tenant for life has power to raise a definite sum for his own use, if and when the land has been charged to the extent of* l. no further charge shall be created without the consent of the said A. B. and C. D.)

Inhibition.—On the death of E. F. [*the registered proprietor*] no entry is to be made until further order.

FORM 7.—*Restriction where the Tenant for Life is registered as Proprietor, and has encumbered his beneficial interest, without reserving his right to exercise his statutory powers. (Rule 71.)*

Until further order no transfer or charge is to be registered without the consent of A. B., of, &c. [*the mortgages of the life interest.*]

FORM 8.—*Restriction where the Trustees of the Settlement are registered as Proprietors. (Rule 71; et ante, p. 615.)*

Until further order no transfer or charge is to be made without the consent of A. B., of, &c. [*the tenant for life.*]

FORM 9.—*Inhibition where there are no Trustees of the Settlement, and the Tenant for Life is registered as Proprietor. (Rule 71.)*

FORM 10.—*Inhibition where Land is settled to such uses as Two Persons, entered as Proprietors, shall jointly appoint, and subject thereto in Settlement. (Rule 71.)*

FORM 11.—*Caution (under the 60th section of the Act of 1875) against the first registration of Land. (Rule 74, ante, p. 657.)*

FORM 12.—*Statutory Declaration in support of a Caution. (Rules 76 and 188.)*

FORM 13.—*Notice (under the 60th and 62nd sections of the Act of 1875) of an application to register Land. (Rule 77, ante, p. 657.)*

FORM 14.—Instrument of Transfer of Land. (Rule 79, ante, p. 641.)**LAND REGISTRY.****Land Transfer Acts, 1875 and 1897.**

District_____

Parish_____

No. of Title_____

(Date.) In consideration of _____ pounds (_____ l.) I, A. B., of &c., hereby transfer to C. D., of &c., the land comprised in the title above referred to.

Signed, sealed, and delivered }
by the said A. B. in the pre- } (Signature of A. B.) (Seal.)
sence of E. F., of &c.

When the consideration is advanced by different persons in separate sums, or does not consist, or wholly consist, of money, its nature, or the separate payments made, may be concisely stated.

When the transfer is to two or more jointly, no addition need be made to the form.

Where it is to two or more as tenants in common, one of the following forms may be used: "to C. D. and E. F. in equal shares," "to C. D. four-fifths, and to E. F. one-fifth of," and so on. Where the transferor retains a share, add the words "and I the said A. B. retain _____ share or shares."

The amount of the consideration should be stated in words, and repeated in figures—as, for instance, "three hundred and seventy pounds (370l.)."

FORM 15.—Instrument of Transfer of part of the Land comprised in a Title. (Rule 80, ante, p. 640.)

As form 14, adding after "the land" these words, "shown and edged with red on the accompanying plan [and—if it is desired that a particular verbal description be entered on the register—described in the schedule hereto] being part of the land comprised in the title above referred to."

Add schedule, if any.

The plan must be signed by the transferor and by or on behalf of the transferee.

FORM 16.—Instrument of Transfer to give effect to a Settlement, of which the existing Registered Proprietor is to be the Tenant for Life, but the Trustees of the Settlement are to be registered as Proprietors. (Rule 81; et ante, p. 616.)**LAND REGISTRY.****Land Transfer Acts, 1875 and 1897.**

District_____

Parish_____

No. of Title_____

(Date.) In pursuance of the provisions of the settlement dated &c., and made between &c. (or created by the will of &c.) under which I, A. B. of &c., am (or have the powers of) tenant for life under the Settled Land Acts, 1882 to 1890, and C. D.

of &c., and E. F. of &c., are trustees with power of sale under the said settlement (or will), I, the said A. B., hereby transfer to the said C. D. and E. F. all the land comprised in the title above referred to, and apply for the registration of the following restriction (*fill in form 8 and execute as form 14*).

FORM 17.—*Instrument of Transfer to give effect to a Settlement of which the existing Registered Proprietor is to be the Tenant for Life, but the donees of an overriding power of appointment vested in him and another are to be registered as Proprietors. (Rule 81, ante, p. 640.)*

FORM 18.—*Instrument of Transfer by the representative of a deceased settlor transferring the Land to the Tenant for Life or to the Trustees. (Rule 81.)*

FORM 19.—*The like, transferring the Land to the Donees of a joint overriding power of appointment. (Rule 81.)*

FORM 20.—*Instrument of Transfer where registered Land is purchased with capital Moneys liable to be laid out in the purchase of Land to be settled to the uses of a Settlement, the Tenant for Life being registered as Proprietor. (Rule 81.)*

FORM 21.—*The like—Trustees being registered as Proprietors. (Rule 81.)*

FORM 22.—*The like, the Donees of a joint overriding power of appointment being registered as Proprietors. (Rule 81.)*

FORM 23.—*Instrument of Transfer of Land without the Mines and Minerals. (Rule 87, ante, p. 640.)*

As Form 14, adding after "above referred to" the words, "except the mines and minerals under the same."

FORM 24.—*Instrument of Transfer of Land with certain Specified Mines and Minerals only. (Rule 87.)*

FORM 25.—*Instrument of Transfer of Land, with the Mines and Minerals, excepting only certain specified Mines and Minerals. (Rule 87.)*

FORM 26.—*Instrument of Transfer of the Mines and Minerals without the Land. (Rule 88, ante, p. 640.)*

As Form 14, adding before "the land" the words, "the mines and minerals under."

FORM 27.—*Instrument of Transfer of certain specified Mines and Minerals without the Land. (Rule 88.)*

FORM 28.—*Instrument of Transfer, without the Land, of the Mines and Minerals, except certain specified Mines and Minerals. (Rule 88.)*

FORM 29.—*Instrument of Transfer of Land in exercise of a power of Sale contained in a Registered Charge. (Rule 90, ante, p. 641.)*

As form 14, adding after “(l.)” the words, “and in exercise of the power of sale conferred by the charge, dated, &c., and registered, &c.,” and at the end, “discharged from the said charge.”

FORM 30.—*Instrument of Transfer of Leasehold Land. (Rules 85, 91; ante, p. 647.)*

As Form 14, adding at the end “for the residue of the term granted by the registered lease.”

Where it is intended to negative the covenants implied by sect. 39 of the Act of 1875, the following words may be added to the form :

“The covenant by the transferor (or transferee, or the covenants by the transferor and transferee) implied by sect. 39 of the Act of 1875 (*ante*, p. 648) is (or are) not to be implied.”

FORM 31.—*Transfer of Land to a Company or Corporation. (Rule 95.)*

FORM 32.—*Transfer of Land for Charitable Uses. (Rule 96, ante, p. 641.)*

FORM 33.—*Certificate as to Vesting in an Incumbent or other Ecclesiastical Corporation. (Rule 98.)*

FORM 34.—*The like Certificate under the New Parishes Acts. (Rule 99.)*

FORM 35.—*The like Certificate under Rule 100.*

FORM 36.—*Transfer of Land subject to restrictive conditions under sect. 84 of the Act of 1875. (Rule 102; et ante, pp. 622, 663.)*

As Form 14 or 15, adding at the end, “subject to the following restrictive conditions, namely :—[*here add the restrictive conditions, as for instance :—*

1. No house on the land shall be used otherwise than as a private dwelling house.

2. The building line shown on the plan shall be observed.

3. Nothing shall be done or permitted on the land that shall be a nuisance to the owners of adjoining land.

4. No house shall be erected of a less value than 500*l.*]

(To be executed as Form 14 by both parties.)

Note.—The conditions must be so framed as to be clear and intelligible when placed in the register of the land transferred, without reference to any document or matter of law or fact which does not appear thereon.

Only restrictive covenants can be registered. Covenants to expend money or to do any work on the land cannot be registered, and should be made the subject of separate agreement.

FORM 37.—*Instrument of Exchange.* (Rule 103, ante, p. 642.)

FORM 38.—*Instrument of Partition.* (Rule 105.)

FORM 39.—*Instrument of Charge.* (Rule 106; et ante, p. 633.)

(Heading as in Form 14.)

(Date.) In consideration of pounds (l.) I, A. B., of &c., hereby charge the land comprised in the title above referred to with the payment to C. D., of &c., on the of , 19 , of the principal sum of l., with interest at per cent. per annum, payable [half yearly, quarterly] on the of , &c., in every year.

(To be executed as Form 14.)

Note.—Where the consideration is advanced by different persons in separate sums or does not consist, or wholly consist, of money, its nature, or the separate payments made, may be concisely stated.

The amount of the consideration should be stated in words, and repeated in figures—as, for instance, “three hundred and seventy pounds (370l.).”

Where the charge is two or more jointly, no addition need be made to the form.

Where the money is to be held in separate shares, the following variation may be used:—

After “payment to” insert “C. D., of &c., and E. F., of &c., on the of , 19 , of the respective principal sums of and with interest” &c., as in the above form.

Any of the following special stipulations may also be added at the end of the charge, and those under the heads A. and B. must be entered in the register.

A.—Stipulations negating the Covenants implied in Charges by sects. 23 and 24 of the Act of 1875; ante, pp. 632, 633.

(1.) No covenant is hereby implied to pay the principal or interest secured by the charge.

(2.) No covenant is hereby implied as to payment of rent or performance or observance of the covenants or conditions of the registered lease, or as to indemnity in respect thereof.

B.—Stipulations in Charges excluding the provisions of sects. 25 to 27 of the Act of 1875, and altering the priority of charges under sect. 28 of the same Act; ante, pp. 634, 635.

(1.) The creditor shall have no power to enter on the land.

(2.) The creditor shall have no power to enforce foreclosure or sale of the land.

(3.) The creditor shall have no power of sale.

(4.) The creditor may exercise the power of sale without notice.

(5.) This charge shall rank *pari passu* with a charge of even date to of to secure or shall be the [first, second, third, &c., as the case may be] in order of priority of three charges of even date, one of which is to of to secure , another is to of to secure , and

the other is this charge or shall have priority to a charge dated, &c., registered, &c., in favour of A. B., of, &c., for (or otherwise as the case may be).

C.—*Miscellaneous Stipulations.*

(1.) The interest secured by the charge shall be reduced to per cent. in every (half-year, quarter, &c.) in which it is paid within days after it becomes due.

(2.) None of the principal secured by the charge shall be called in till the of 19 unless the interest shall fail to be paid within days after it becomes due.

(3.) None of the principal secured by the charge shall be paid off till the of 19 unless the proprietor of the charge shall be willing to accept it.

(4.) If the interest secured by the charge shall be paid within days after it becomes due the principal shall be payable by instalments of each, to be paid on the of and the of in every year, the first of such instalments to be paid on the of 19.

Provided that on failure of payment of any instalment within days after it becomes due, the whole of the principal remaining owing on the said security shall become payable at once.

Provided nevertheless that the whole or any part (not less than at any one time) of the above mentioned principal may be paid off on giving one calendar month's notice in writing of the intention to do so, and on paying up all arrears of interest that may be due at the time of such payment of principal.

FORM 40.—*Instrument of Charge by way of Annuity.* (Rule 108, ante, p. 633.)

(Heading as in Form 14.)

(Date.) I, A. B., of, &c., hereby charge the land comprised in the title above referred to with the payment to C. D., of &c., of an annuity of for years (or during his life, &c.) payable [half yearly, quarterly] on the of &c., in every year.

(To be executed as Form 14.)

Note.—If there is any consideration, it can be stated at the commencement as "To secure part of the purchase money of the land comprised in the title above referred to" or "In consideration of an instrument of transfer of even date herewith of the land comprised in the title above referred to," &c., &c.

If only part of the land comprised in the title is charged, add after "land" the words "shown and edged with red in the accompanying plan signed by me, being part of the land," &c.

If the charge is to secure a periodical payment which is not an annuity, the form may be varied accordingly.

FORM 41.—*Charge to secure future Advances.* (Rule 108.)

As Form 39, adding at the end, "and of every sum hereafter advanced by him with interest at the rate aforesaid, payable on the appointed days, and computed from the time of advancing the same."

FORM 42.—*Application to alter the Terms of a Charge under sect. 9 (5) of the Act of 1897. (Rule 111, ante, p. 635.)*

FORM 43.—*Discharge of Registered Charge. (Rule 112, ante, p. 636.)*

(Heading as in Form 14.)

(Date.) I, A. B., of &c., hereby admit that the charge dated of 18 , and registered of 18 , of which I am the registered proprietor, has been discharged.

(To be signed by the registered proprietor of the charge, and attested.)

Note.—The discharge may be made as to part of the land only, by adding at the end “as to the land shown and edged with red on the accompanying plan, signed by me, being part of,” or as to part of the money only by adding “to the extent of .”

FORM 44.—*Instrument of Transfer of Charge. (Rule 114; et ante, p. 648.)*

(Heading as in Form 14.)

(Date.) In consideration of , I, A. B., of &c., hereby transfer to C. D., of &c., the charge dated of , 18 , and registered of 18 , of which I am the registered proprietor.

(To be executed as Form 14.)

Note.—Where the charge is transferred to two or more as tenants in common, words to that effect should be added : *see note* to Form 14.

FORM 45.—*Transfer and Discharge. (Rule 127, ante, p. 636.)*

(Heading as in Form 14.)

(Date.) In consideration of pounds (l.) paid to A. B., of &c. [*the proprietor of the land*], and of pounds (l.) paid to C. D., of &c. [*the proprietor of the charge*], the said A. B. hereby transfers to E. F., of &c., the land comprised in the title above referred to, and the said C. D. hereby discharges the same from the charge dated of 18 , registered of 18 , of which he is the registered proprietor, and from all liability in respect thereof.

(To be executed as Form 14 by A. B. and C. D.)

Note.—Where there are two or more charges to be discharged, the form may be altered as follows :—

After “C. D., of &c.” insert “and pounds (l.) paid to E. F., of &c.” (*and so on, as to the proprietors of all the charges to be discharged*), and after “above referred to,” continue, “the said C. D. and E. F. hereby respectively discharge the same from the charges dated of 18 , and of 18 , (*and so on as to all the charges to be discharged*) registered of 18 , and of 18 , (*and so on*) of which they are the respective proprietors, and from all liability in respect thereof.”

FORM 46.—*Instrument of Assent to a Devise of Land under sect. 3 of the Act of 1897. (Rule 130; et ante, p. 650.)*

(Heading as in Form 14.)

(Date.) I, A. B., of &c., as personal representative of the late C. D., of &c., hereby assent to the devise contained in the will of the said C. D. to E. F. of the land comprised in the title above referred to.

(To be signed by A. B. and attested.)

Note.—If the assent is to be subject to a charge for payment of money which the personal representative is liable to pay, or if the land devised is part only of the land comprised in the title referred to, the form may be varied accordingly.

FORM 47.—*Instrument of Appropriation of Land in satisfaction of a Legacy or Share in Residuary Estate under sect. 4 of the Act of 1897. (Rule 130.)*

FORM 48.—*Notice of divesting of the Estate of the Official Receiver or of a Trustee in Bankruptcy. (Rule 144.)*

FORM 49.—*Application to enter notice of an Estate in Dower or by the Curtesy. (Rule 170, ante, p. 654.)*

FORM 50.—*Notice of Liability to Death Duty. (Rule 171; et ante, p. 624.)*

The land is liable to such death duties as may be payable or arise by reason of the death of A. B., of &c., who died on the of , 18 , (or by reason of a settlement created by deed, dated, &c., or by reason of the determination of a lease dated, &c., or as the case may be).

FORM 51.—*Certificate of Non-liability to Death Duty. (Rule 173; et ante, p. 650.)*

This is to certify that the land comprised in the title No. , may be registered without notice of any liability to death duty by reason of the death of A. B., of &c., and that any such notice already registered may be cancelled.

Dated the day of , 19 .

Note.—If the certificate is to apply to part only of the land comprised in the title, the words “shown and edged with red on the accompanying map, being part of the land,” should be inserted after the word “land.”

FORM 52.—*Entry restraining a disposition by a sole surviving Proprietor. (Rule 185, ante, p. 618.)*

FORM 53.—*Caution (under the 53rd sect. of the Act of 1875) against Dealings with registered Land or a Charge. (Rule 188, ante, p. 654.)*

(Heading as in Form 14, giving also the number of the charge, if one.)

(Date.) A. B., of &c., requires that no dealing with the land (or charge) above referred to (or with the land shown and edged with red on the plan attached

hereto) shall be had on the part of the registered proprietor until notice has been served upon him.

(To be signed by the person lodging the caution or his solicitor.)

Note.—If the address given is not within the United Kingdom, an address for service within it must also be given.

FORM 54.—*Caution against the registration of a possessory or qualified title, as qualified or absolute. (Rule 188.)*

FORM 55.—*Notice to a person who has lodged a Caution. (Rule 190.)*

FORM 56.—*Application to withdraw a Caution. (Rule 192, ante, p. 655.)*
(Heading as in Form 53.)

(*Date.*) I, A. B., of &c. [the person who lodged the caution], hereby apply to withdraw the Caution lodged in my name on the of 18 against the title [or charge] above referred to.

(To be signed by the applicant or his solicitor.)

FORM 57.—*Application to register a Restriction under sect. 58 of the Act of 1875, as amended by the Act of 1897. (Rule 196; et ante, pp. 617, 656.)*

(Heading as in Form 53.)

(*Date.*) A. B., of &c., hereby applies to the registrar to enter the following restriction against the title (or charge) above referred to.

Restriction.—Until further order no entry affecting the land comprised in the title (or the charge) above referred to shall be made without the consent of A. B., of &c. (or otherwise—see examples in Forms 6 to 10).

(To be signed by A. B. or his solicitor.)

FORM 58.—*Application to withdraw or modify a Restriction. (Rule 196; et ante, p. 657.)*

(Heading as in Form 53.)

(*Date.*) A. B., of &c., hereby applies to the registrar to modify (or withdraw) the restriction registered on the of 18 , against the title (or charge) above referred to as follows: (*Fill in the proposed modification, or, in case of withdrawal, omit the words "as follows"*).

(To be signed by the applicant (or his solicitor) and all other persons interested (or their respective solicitors); and attested.)

FORM 59.—*Inhibition where the Incumbent of a Benefice is the registered Proprietor of Land. (Rule 197.)*

FORM 60.—*Certificate under sect. 15 of the Act of 1897 as to a Disposition by the Incumbent of a Benefice. (Rule 199.)*

FORM 61.—Land Certificate. (*Rule 204; et ante, pp. 620, 621, 644, 646.*)**LAND REGISTRY.**

Land Transfer Acts, 1875 and 1897.

LAND CERTIFICATE.

This is to certify that *A. B.*, of &c., is registered as the proprietor with an absolute [qualified or possessory] title of the freehold (*or* leasehold) land known as _____, comprised in the title No. _____ in the parish [or extra parochial place] of _____, in the district of _____, and county of _____.

Copies of the entries in the register, and of the filed plan of the land are annexed hereto.

Dated the _____ day of _____ 19 ____.

(Land Registry Seal.)

(Here follow copies of the entries in the register and a copy of the filed plan.)

Note.—The description of the property to which the certificate relates must be adapted to that by which it is described in the register. When the registration is of a possessory title only, the certificate is to contain the following notice: "The possessory title hereby certified does not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title hereby certified, which was subsisting or capable of arising on the _____ day of _____, being the date of first registration."

FORM 62.—Certificate of Charge. (*Rule 204; et ante, p. 634.*)**LAND REGISTRY.**

Land Transfer Acts, 1875 and 1897.

CERTIFICATE OF CHARGE.

This is to certify that *A. B.*, of &c., is registered as the proprietor of the charge No. _____, for _____ pounds (____ l.), secured on the freehold [*or* leasehold] land known as _____ [being part of the land] comprised in the title No. _____, in the parish [or extra parochial place] of _____ in the district of _____, and county of _____.

Copies of the charge and of the entries in the register relating to that title and of the filed plan of the land comprised in the charge are annexed hereto.

Dated the _____ day of _____ 19 ____.

(Land Registry Seal.)

(Here follow copies of the charge, and of the entries in the register, and of the filed plan referred to.)

Note.—When the registrar is satisfied that any particular entry in the register does not affect the land comprised in the charge, he may direct its omission from the certificate of charge.

FORM 63.—Official Certificate of result of Search. (*Rule 224; et ante, p. 639.*)

District . Parish . No. of Title .

[Reference to charge or incumbrance .]

(*Date.*) In reply to an application, dated, &c., made by A. B., of &c., requiring a search to be made, whether [*&c., stating the effect of the application*] it is hereby certified that the search has been diligently made, with the following result:—

(Fill in result of search.)

FORM 64.—Summons on application to the Court. (*Rule 237.*)

FORM 65.—Certificate of Value. (*Rule 265, ante, p. 670.*)

(Heading as in Form 1.)

I, A. B., of &c., am well acquainted with the land which is the subject of the (*describe the instrument or application which is being made*), and I certify that to the best of my judgment, knowledge, and belief, the present capital value thereof, together with all buildings and improvements, and timber (*if any*) does not exceed l.

Dated the day of 19 .

FORM 66.—Certificate of Examination of a Married Woman. (*Rule 275; et ante, pp. 663, 664.*)

FORM 67.—Statutory Declaration verifying a Certificate of Examination of a Married Woman. (*Rule 275.*)

THE SECOND SCHEDULE TO THE RULES.

Solicitor's Remuneration. (*Rule 271, ante, p. 660.*)

PART I.

Scale of Charges for First Registration with Absolute or Qualified Title.

For the first 1000l. in value, 30s. per 100l.

For the second and third 1000l., 20s. per 100l.

For the fourth and each subsequent 1000l. up to 10,000l., 10s. per 100l.

And for each subsequent 1000l. up to 100,000l., 5s. per 100l.

A minimum charge of 3l. is to be made where the value is under 100l., and a minimum charge of 5l. where the value is 100l. or over.

Fractions of 100l. under 50l. are to be reckoned as 50l.

Fractions of 100l. above 50l. are to be reckoned as 100l.

Where the value exceeds 100,000l., the charge is to be as on 100,000l.

PART II.

Scale of Charges for (1) First Registration with Possessory Title and (2) Transfers, Charges, Exchanges, and Partitions of Registered Land or a Registered Charge.

Value of land or amount of charge.	Scale of charges.
Not exceeding 1000 <i>l.</i>	10 <i>s.</i> 6 <i>d.</i> for every 100 <i>l.</i> or part of 100 <i>l.</i>
Exceeding 1000 <i>l.</i> and not exceeding 20,000 <i>l.</i>	5 <i>l.</i> 5 <i>s.</i> for the first 1000 <i>l.</i> and 1 <i>l.</i> 1 <i>s.</i> for every subsequent 2000 <i>l.</i> or part of 2000 <i>l.</i>
Exceeding 20,000 <i>l.</i> and not exceeding 40,000 <i>l.</i>	15 <i>l.</i> 15 <i>s.</i> for the first 20,000 <i>l.</i> and 1 <i>l.</i> 1 <i>s.</i> for every subsequent 4000 <i>l.</i> or part of 4000 <i>l.</i>
Exceeding 40,000 <i>l.</i>	21 <i>l.</i> for the first 40,000 <i>l.</i> and 1 <i>l.</i> 1 <i>s.</i> for every subsequent 10,000 <i>l.</i> or part of 10,000 <i>l.</i> up to a maximum of 26 <i>l.</i> 5 <i>s.</i>

THE SECOND SCHEDULE TO THE ACT, 1897 (s. 22 (5)).—FEES.

The following fees shall be paid in districts where registration of title is compulsory, and shall include all necessary surveying, mapping, and scrivenery, and the preparation, issue, endorsement, or deposit, as the case may be, of a land certificate, office copy, registered lease, or certificate of charge; discharges of incumbrances, the registration of any necessary cautions, inhibitions or restrictions, the filing of auxiliary documents (if any), and all other necessary costs of and incidental to the completion of each registration or transaction, whether under one or under several titles.

For possessory registration, and for transfers, charges, and transfers of charges for valuable consideration :—

Value.	Fees.
Not exceeding 1000 <i>l.</i>	1 <i>s.</i> 6 <i>d.</i> for every 25 <i>l.</i> or part of 25 <i>l.</i>
Exceeding 1000 <i>l.</i> and not exceeding 3000 <i>l.</i>	3 <i>l.</i> for the first 1000 <i>l.</i> , and 1 <i>s.</i> for every 25 <i>l.</i> or part of 25 <i>l.</i> over 1000 <i>l.</i>
Exceeding 3000 <i>l.</i> and not exceeding 10,000 <i>l.</i>	7 <i>l.</i> for the first 3000 <i>l.</i> , and 1 <i>s.</i> for every 50 <i>l.</i> or part of 50 <i>l.</i> over 3000 <i>l.</i>
Exceeding 10,000 <i>l.</i>	14 <i>l.</i> for the first 10,000 <i>l.</i> , and 1 <i>s.</i> for every 100 <i>l.</i> or part of 100 <i>l.</i> , up to a maximum of 25 <i>l.</i> for 32,000 <i>l.</i>

For transmissions and transfers not for value, notices of leases, and rectification of the register, and land :—

One quarter of the above fees, according to the capital value of the interest dealt with, with a minimum of 1*s.* and a maximum of 5*l.*

No fees to be charged for inspection of the register.

Order as to Fees (October 27th, 1898).

Note.—The following fees must be considered in connection with the rules hereinafter contained.

(A.) For entry of first proprietorship of land with a possessory title; for registration of charges, and transfers of land and charges, for valuable consideration; and for removal of land from the register:—

Value of Land or Amount of Charge.	Fees.
Not exceeding 1000 <i>l.</i>	1 <i>s.</i> 6 <i>d.</i> for every 25 <i>l.</i> or part of 25 <i>l.</i>
Exceeding 1000 <i>l.</i> and not exceeding 3000 <i>l.</i>	3 <i>l.</i> for the first 1000 <i>l.</i> , and 1 <i>s.</i> for every 25 <i>l.</i> or part of 25 <i>l.</i> over 1000 <i>l.</i>
Exceeding 3000 <i>l.</i> and not exceeding 10,000 <i>l.</i>	7 <i>l.</i> for the first 3000 <i>l.</i> , and 1 <i>s.</i> for every 50 <i>l.</i> or part of 50 <i>l.</i> over 3000 <i>l.</i>
Exceeding 10,000 <i>l.</i>	14 <i>l.</i> for the first 10,000 <i>l.</i> , and 1 <i>s.</i> for every 100 <i>l.</i> or part of 100 <i>l.</i> over 10,000 <i>l.</i> , up to a maximum of 25 <i>l.</i> for 32,000 <i>l.</i>

(B.) For registration of transmissions, and of transfers not for value (including exchanges), notices of leases, rectifications of the register under sect. 95 of the Act of 1875, and entries and corrections under rules 101 and 120(a):—

One quarter of the above fees, according to the capital value of the interest dealt with, with a minimum of 1*s.* and a maximum of 5*l.*

(C.) For entry of first proprietorship of leasehold land on the occasion of the original grant of the lease; for entry of first proprietorship of freehold land with a possessory title on the occasion of a grant, wholly or partly in consideration of a rent; and for registration of the transferee on a transfer of freehold land on a like occasion:—

(a.) In respect of the average rent 2*s.* for every 10*l.* a year, and

(b.) In respect of the premium (if any) the same fee on its amount as above prescribed for a transfer for value of land.

Provided that no greater fee than 10*l.* be paid in any case.

(D.) For entry of first proprietorship of land with an absolute or qualified title:—

Three times the fee prescribed for registration of a possessory title, with a minimum fee of 3*l.*

(E.) For registration of the proprietorship of an incumbrance, prior to registration, and of a transfer or transmission thereof:—

The same fee as for registration of a charge or of a transfer or transmission thereof respectively.

(a) As amended by Rules, June 29th, 1899, r. 11.

(F.) For a land certificate, or certificate of charge, except where required by the Acts or rules, to be issued free of charge:—

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Where the value of the land or charge does not exceed 200 <i>l.</i> ...	0	10	0
Exceeds 200 <i>l.</i> , but does not exceed 1000 <i>l.</i> ...	1	0	0
„ 1000 <i>l.</i> ...	2	0	0

(G.) For altering a land certificate to correspond with the register, except where such alteration is required by the Acts or rules, to be made free of charge:—

Half the fee for a certificate.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
(H.) For registering an inhibition ...	1	0	0
For annexing conditions to land ...	1	0	0
For entering notice of an estate in dower or by the curtesy ...	1	0	0
For preparing or settling a statement for the court ...	1	0	0
For registering a caution or restriction ...	0	10	0
For alteration or withdrawal of an inhibition ...	0	10	0
For discharging or altering conditions ...	0	10	0
For entering a note or notice under sect. 18 of the Act of 1875...	0	10	0
For an entry negating or altering implied covenants, powers, priorities, &c. ...	0	10	0
For examination of a married woman by an officer of the Registry	0	10	0
For comparison of abstracts with deeds, by officers of the Registry—per hour ...	0	10	0
For entering an additional address for service ...	0	10	0
For inspection of the Register after removal of land—			
(a) If within one year of the removal ...	0	5	0
(b) After one year from the removal ...	0	10	0
For a certificate of result of official search—per title ...	0	5	0
For alteration or withdrawal of a caution or restriction ...	0	5	0
For a summons ...	0	5	0
For inspection of any document not referred to on the Register	0	5	0
For any entry on the Register, for which no other fee is provided	0	5	0
For noting the determination of a lease, or of an estate in dower, or by the curtesy ...	0	2	6
For taking an affidavit or declaration ...	0	1	6
For each exhibit thereto ...	0	1	0
For entering notice of a mortgage by deposit of certificate ...	0	1	0
For every notice under the Registry stamp ...	0	1	0
For office copies—per folio... ..	0	0	3
For copies of plans...Such charges, according to time and labour employed, as the Registrar shall from time to time authorise.			

(I.) For entry of a notice, under sect. 50 of the Act of 1875, of a lease or sub-lease by way of security for money is to be the same as that for registration of a charge for the amount secured, unless a charge is also registered at the same time in respect of the same advance, when the fee for entry of that notice is to be according to paragraph (B), but not exceeding 10*s.*(a)

Rules.

1. The above fees include, in the matters to which they relate, all necessary stationery and mapping done in the Registry; the preparation, issue, endorsement, and deposit of certificates wherever such issue,

(a) Added by Rules, June 29, 1899, r. 12.

endorsement, or deposit is obligatory; discharges of incumbrances; the filing of auxiliary documents (if any); and all other necessary costs of and incidental to the completion of each registration or transaction. They also include, in districts where registration of title is compulsory, any surveying that may be necessary to enable the land to be identified on the ordnance map.

2. Where an application for first registration with absolute title is completed with a qualified title only, such abatement (if any) in the fee may be made as the Registrar may deem reasonable, under the circumstances of the case.

3. The fees payable in respect of any matter involving an enquiry into title are exclusive of the fees of conveyancing counsel, and of any costs or expenses incurred by the Registry in regard to the matter.

4. Where land, already registered with a possessory title, is to be registered with a qualified or an absolute title; or where land, already registered with a qualified title, is to be registered with an absolute title, the Registrar may make such abatement (if any) in the fee as he shall deem reasonable.

5. The fee for an entry in, or withdrawal from the Register affecting several titles whereof the same person is registered as proprietor, shall be the same as for an application respecting one title only. In other cases an extra fee of 2s. 6d. shall be charged for every title affected after the first.

6. Where a transfer for value and a charge are registered together, only half the fee shall be paid in respect of the charge.

7. Where an application is made by post, the fee may be paid by banker's draft, or by postal or post office order, or in Bank of England notes.

8. The fee for the first registration of leasehold land shall include the entry of a notice of the lease against the lessor's title, if registered.

9. When a transfer of freehold land in consideration of a rent, or a transfer by which mines and minerals are dealt with separately, is registered, the fee shall not include the registration of the proprietor of the rent, or of the severed land or mines and minerals respectively, as the case may be, for which a separate fee shall be payable as on a transfer of land.

10. The fee payable for registration of proprietorship of an incumbrance, if made on the first registration of land, shall be reduced to one quarter of the fee above prescribed.

11. The fee for every entry of, and in respect of, a caution, inhibition or restriction, condition, note or notice of any kind, shall not be payable when such entry is made on the first registration of land, or on any registration for which an *ad valorem* fee is payable.

12. The amount of an average rent for the purposes of these fees shall be ascertained in the same manner as for the purposes of Inland Revenue Stamp Duty.

13. Where a charge or incumbrance is also secured on unregistered land as well as on registered land, an abatement in the fee shall be

made, proportional to the value of the unregistered land as compared with the value of the whole security.

14. The word "land" includes both freehold and leasehold land, and every hereditament the title to which may be registered under the Land Transfer Act's.

15. When boundaries are to be noted on the Register as accurately defined, such additional charges may be made for mapping and surveying as the Registrar shall in each case direct.

16. Where land is transferred for value subject to a registered incumbrance or charge, the fee payable shall be calculated on the amount of the purchase money or, where the consideration given is not money, on the value of the equity of redemption.(a)

17. If within two years after a full *ad valorem* fee under paragraphs (A) or (D) of the fee order has been paid in respect of any land or charge, a subsequent transfer of the whole land or charge is made, the fee payable upon the transfer shall on each occasion be reduced to that stated in paragraph (B) of the order.

18. Where, on the cessation of a charge, a new charge is registered in favour of the proprietor of the former charge, the fee payable on the new charge, in so far as it does not exceed the former charge, shall be calculated at the rate stated in paragraph (B) of the fee order.

19. The reduction granted by the two preceding rules must be claimed at the time of delivering the instrument for registration, and will not afterwards be allowed.(a)

(a) Rules 16 to 19 are given by the rules of June 29th, 1899.

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